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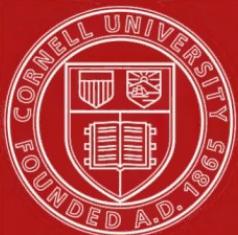
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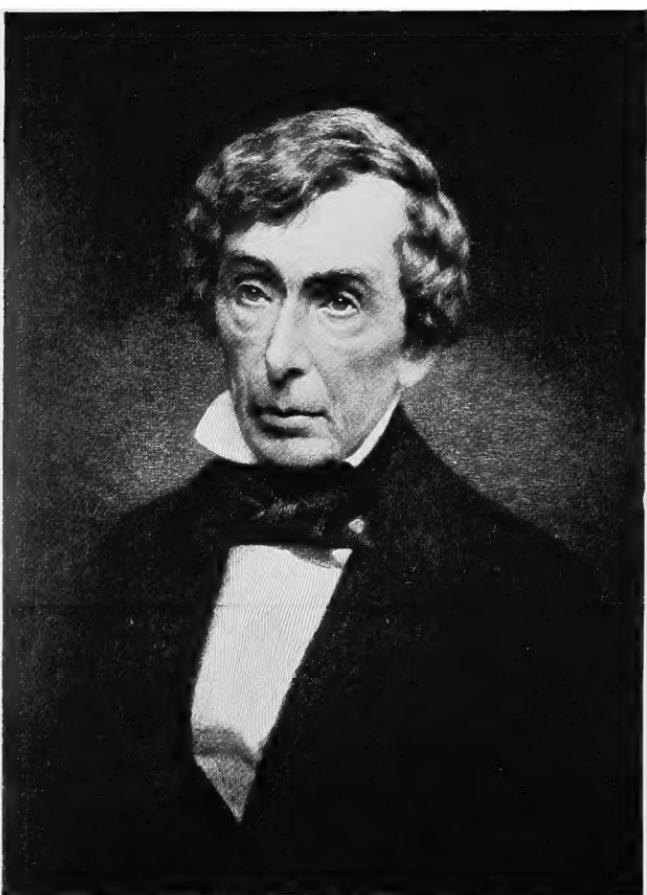


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GREAT AMERICAN LAWYERS



ROGER BROOKE TANEY

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Great American Lawyers

The Lives and Influence of Judges and
Lawyers Who Have Acquired Perma-
nent National Reputation, and Have
Developed the Jurisprudence of the
United States.

A HISTORY OF THE LEGAL PROFESSION
IN AMERICA

EDITED BY
WILLIAM DRAPER LEWIS
of the University of Pennsylvania
Dean of the Law Department

VOLUME IV

PHILADELPHIA
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JOHN HEMPHILL

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JOHN HEMPHILL

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JOHN HEMPHILL.

1803-1862.

BY

REUBEN REID GAINES,

Chief-Justice of Texas.

IT is somewhat remarkable, that one who has lived through an eventful period in the history of his country, and who attained in his state the eminence of Chief-Justice Hemphill, should have left so little record of the incidents either of his public or his private life.

He was born on the 18th day of December, 1803, in Chester District, South Carolina, near where now stands the little village of Blackstock. His father was a native of Ireland who came to Pennsylvania in 1783, and entered Dickinson College where he graduated subsequently removing to South Carolina. He was a licensed minister of the Associate Reformed church, and a man of great force of character. The mother of Judge Hemphill was named Lind, and was a daughter of a minister also of the Associate Reformed church, who resided in Greencastle, Pennsylvania. She was related on her mother's side to the celebrated Robert Fulton, the in-

ventor of the successful application of steam to water navigation.

Judge Hemphill obtained his education preparatory to his entrance into college in the common schools, in the section of country in which he was born. Having taught school for one year, presumably for the purpose of raising money to defray the expense of a higher education, in the summer of 1823, he entered Jefferson College, Pennsylvania. There he took his degree two years later—ranking upon his graduation next to the highest in his class. He was noted in college as an excellent student and especially as a good linguist. After his graduation he taught school in Abbeville and Richland districts, South Carolina, until the year 1829 when he entered the office of D. J. McCord, Esq., an eminent lawyer of that day, residing in Columbia, and devoted himself exclusively to the study of law. In November of that year he was admitted to practice in the court of Common Pleas and opened his office in Sumter district. In 1831 he was admitted to practice in the courts of Chancery.

In the early part of the year 1836, the people of South Carolina being aroused by the outbreak of the Seminole Indians in Florida, he endeavored to raise in Sumter district a company of volunteers, to aid in suppressing the insurrection. Having failed in this attempt, he repaired to Columbia and there joined a company, of which he became a second lieutenant. These patriotic volunteers, seem to have acquired in

the swamps of Florida, more malaria than martial renown. Many of them returned with their health seriously impaired, and among these was John Hemphill.

In the years 1836 and 1838, his name appears as counsel in the official report of cases appealed to the court of last resort from the district in which he practiced. In the summer of 1838 he came to Texas, and in September of that year was licensed to practice law in the Republic. He opened an office in the old town of Washington and the county of the same name.

The laws of Spain and Mexico then prevailed in the Republic of Texas and the titles to land, which had emanated from these governments were written in the Spanish language. The tradition is that he appreciated the fact that a knowledge of the Spanish language was necessary to a successful practice of his profession in his new field; and that he became a recluse and devoted himself to its study until he mastered it sufficiently for his purpose.

Under the constitution of the Republic adopted in 1836, the Supreme Court consisted of a Chief-Judge and Associate-Judges, all of whom were to be elected by the Congress. The Associate-Judges were the district judges, who presided in the district courts, which were trial courts of general jurisdiction. The functions of the Chief-Judge were merely those of a presiding judge and member of the Supreme Court. In 1840 Judge Hemphill was

elected judge of the Fourth district and was commissioned as such on the 20th day of January of that year.

At this period an incident occurred in his life which is worthy of being related. For a series of years, the Comanche Indians had raided the western frontier of the Republic, had massacred the settlers, driven away their cattle and horses and carried the women and children into captivity. With a view to restore these captives to liberty and bring about peace with these savages, successive treaties had been entered into by the authorities of the Republic with the Comanche Chiefs. None of these were observed on the part of the Comanches. About the first of the year, 1840, they again made overtures of peace and promised to meet the Texas authorities in San Antonio, and to bring with them the captives then under their control. Albert Sidney Johnston, then the Secretary of War of the Republic, ordered Colonel Hugh McLeod, the Adjutant-General and Colonel W. G. Cooke, Quarter-Master General to repair to the council as commissioners, and in the event the Comanches did not comply with their previous agreement and preliminary promise, to hold the delegated chiefs as hostages for the safety and liberation of the captives held by them. The representatives of Texas and the Indian Chiefs with their retainers, met in council in San Antonio on the 19th day of March, 1840. The latter instead of bringing with them all the captives as promised brought but one—

an intelligent girl of thirteen years of age, who acquainted Colonel McLeod with the fact that the other captives might have been brought, but that their scheme was to exact a ransom for her and to bring the others in by detail for the same purpose. But we will let the official report of Colonel McLeod, made a few days after the affair, tell the remainder of the story:

The troops being now posted, the (twelve) chiefs and captains were told that they were our prisoners and would be kept as hostages for the safety of our people in their hands, and that they might send their young men of the tribe, and as soon as our friends were restored they should be liberated. Capt. (George T.) Howard, whose company was stationed in the council house, posted sentinels at the doors and drew up his men across the room. We told the chiefs that the soldiers they saw were their guards, and descended from the platform. The chiefs immediately followed. One sprang to the back door and attempted to pass the sentinel, who presented his musket, when the chief drew his knife and stabbed him. A rush was then made to the door. Capt. Howard collared one of them and received a severe stab from him in the side. He ordered the sentinel to fire upon him, which he immediately did, and the Indian fell dead. They then all drew their knives and bows, and evidently resolved to fight to the last. Col. Fisher, ordered: "Fire, if they do not desist." The Indians rushed on, attacked us desperately, and a general order to fire became necessary. After a short but desperate struggle every one of the twelve chiefs and captains in the council house lay dead upon the floor, but not until, in the hand-to-hand struggle, they had wounded a number of persons. . . . John Hemphill, assailed in the council house by a chief and slightly wounded, felt reluctantly compelled (as he remarked to the writer afterwards) to disembowel his assailant with his bowie knife, but declared that

he did so under a sense of duty, while he had no personal acquaintance with nor personal ill-will towards his antagonist.

I have sought in vain to ascertain how Judge Hemphill came to be present at this council. He was then as I have said a judge of the district court, and it is not at all likely that he had any part in it. He may have been holding court in San Antonio at the time the council met, and it is not improbable that the courthouse may have been selected as the place for the meeting of the council. At all events, it is to be inferred from his remarks to McLeod, that his presence at the council was accidental, and that his participation in the ensuing conflict, resulting in the necessity of slaying his assailant was forced upon him, to his great regret.

On December 16, 1836, James Collingsworth was elected the first Chief-Justice of the Republic of Texas. Having died before a session of the court, at the next session of the Congress, Thomas J. Rusk was elected to fill the place. Rusk having resigned the office in the latter part of the year 1840, on December 5th, of that year, Judge Hemphill was elected by the Congress his successor as chief-justice. This office he held until Texas ceased to be an independent republic, and became one of the states of the American Union.

The Mexican government declining to recognize the independence of Texas and also fearing its annexation to the United States, in order to demonstrate that hostilities had not ceased between it and

the insurgent state, sent two hostile expeditions into Texas. The second invasion was by a well-appointed force led by General Wool, which entered San Antonio and captured and carried away as hostages many of its prominent citizens. To check these incursions, to chastise the enemy and to make reprisals, a force under the command of General Somervell was sent to the Rio Grande. Judge Hemphill served with this force, and during a part of the time at least, acted as adjutant-general to the Commander. The general having reached the Rio Grande determined that his command was insufficient to invade the territory beyond the river and resolved to return; so that nothing came of the expedition—save that a portion of his command, despite his orders, crossed into the Mexican territory, was captured and sent to the city of Mexico.

The expedition on its return reached San Antonio in the latter part of January, 1843, whereupon Judge Hemphill seems to have resumed the duties of his office as chief-justice. The records of the Supreme Court of the Republic show, that he was present at the next term held in June, 1843, and at every term thereafter until by virtue of the annexation of Texas to the United State the court ceased to exist.

It has been stated that Judge Hemphill resigned the office of chief-justice in order to become adjutant-general to General Somervell. But this may be doubted. For some reason there was no session of

the Supreme Court from June, 1842 to June, 1843; so that his service in Somervell's expedition did not interfere with his judicial duties. The order for the counter-march is signed by him as "Acting Adjutant-General" from which it is to be inferred that he merely acted in that capacity without accepting the office.

When the question arose as to the annexation of Texas to the United States, Judge Hemphill became an earnest advocate of that policy, and was elected a member of the convention of 1845. This convention passed the ordinance accepting the resolution of the Congress of the United States which provided for the annexation. His name appears as one of the signers of that ordinance.

Under the constitution of the state of Texas adopted in 1845, Judge Hemphill was appointed by the Governor and was on the 2d day of March, 1846, confirmed by the Senate as the first chief-justice of the state for the term of six years. In the meantime the constitution having been amended as to the mode of selecting judges of the Supreme Court on August 4, 1851, he was elected by the people to succeed himself. In the year 1858, having been elected to the Senate of the United States, he resigned the office of chief-justice and accepted that of Senator in the Congress of the United States. He withdrew from the Senate of the United States upon the passage of the ordinance of secession by the Texas convention which met in 1861. He was selected as a delegate to the

Provisional Congress of the Confederate States and served as such until his death—which occurred at Richmond, Virginia, in January, 1862.

Judge Hemphill's fame rests upon his labors as chief-justice. It is proper therefore that some account should be given of his more noted opinions. Preliminary to this task, as showing the bent of his mind in favor of the jurisprudence of the civil law, we quote from his remarks, made in the Convention of 1845, called for the purpose of framing the constitution for the state, in course of the debate upon the judiciary article of that instrument. He spoke as follows:

I can not say that I am very much in favor of either chancery or the common-law system. I should much have preferred the civil law to have continued in force for years to come. But inasmuch as the chancery system, together with the common law, has been saddled upon us, the question is now, whether we shall keep up the chancery system or blend them together. If we intend to keep it up as it is known in the courts of England, the United States, and many of the states, and in the United States courts that will be established here, we should oppose this innovation; for I do not know any alteration which could be a greater innovation than to subject all chancery cases to a trial by jury.

In 1840 the Congress of the Republic of Texas adopted the common law except as to the rights of married persons. In the same act, the community system as to the property of husband and wife as known to the Spanish law was in its main features kept in force. This, as might have been expected, gave rise to many important questions which were to

be determined in the courts of the country; and since precedents were not authority under the Spanish jurisprudence, they had to be determined without the aid of authoritative decisions of the courts. By reason of Chief-Judge Hemphill's knowledge of the Spanish language and his superior learning in the laws of Spain, the task of writing upon these questions fell mainly upon him. At the first session of the Supreme Court after Texas became a state of the Union, the case of Smith vs. Smith¹ came before the court. One John W. Smith having died, his reputed wife applied for letters of administration upon his estate. Under the statutes of Texas the surviving wife had the right to administer upon the estate of her deceased husband. It appeared that the alleged wife and the deceased in the year 1830 were married in Texas in conformity with all the requirements of the Spanish law and that, if any impediment to the marriage existed she neither at that time nor at any time before his death, had knowledge of the fact. The application was contested by one who claimed to be a son of the deceased and who asserted that the marriage between the applicant and the deceased was illegal for the reason that at the time, he had a lawful wife living in the state of Missouri. The rights of a putative wife under such circumstances came in question and it was held, that under the Spanish law, such a wife was entitled to all the property rights of a lawful spouse and that the applicant

¹ 1 Texas Reports, 621.

must be treated as "the surviving wife," as those words are used in the statute, and therefore entitled to be appointed administratrix of the estate of the deceased. Chief-Justice Hemphill wrote the opinion of the court, which was concurred in by both of his associates, and in which that question and some others are discussed with his accustomed ability and elaboration. Such authorities upon the Spanish law as were accessible to the court are exhaustively discussed and with conclusive force.

In the case of Babb vs. Carroll,² it fell to Chief-Justice Hemphill to discuss two important questions —one growing out of the colonization laws of Mexico and Texas, and the other out of the Spanish law. One Babb having a lawful wife and children living in Tennessee, in the year 1829 came to Texas with one Eda Collier, with whom he had formed an adulterous connection. Babb died in 1837 and a certificate issued to his "heirs" *eo nomine* in 1838, which was located upon the land in controversy. A patent issued to the land in 1845. The defendants in the suit claimed one-half of the land through one R. M. Hopkins, to whom Babb in his lifetime had sold one-half of his right and the other half by conveyance from Eda Collier and her son. The suit was brought by the lawful wife and the legitimate children of the deceased for the recovery of the land.

Under the laws then prevailing in Texas, Babb had the right to convey absolutely the title to the com-

² 21 Texas Reports, 765.

munity estate of himself and his wife, and therefore the sale by him to Hopkins of one-half of his right as head of a family to a league and labor of land, by reason of his immigration, passed to his vendee a title to one-half of the land to be acquired by virtue of that right. Therefore it was held, that the defendants who claimed under Hopkins had title to an undivided half of the land located by virtue of the certificate. The question remained as to the title to the other half. The defendants had the title if any of Eda Collier, the reputed wife and of her son, who was not the son of the deceased. There were the rights of the plaintiffs the lawful wife and of her children by the deceased to be determined. As to the right to acquire the land, which had not been sold by Babb before his death, one-half belonged to him and the other to his wife under the community laws of Spain, which prevailed in Texas at that time. He had a lawful wife who never came to Texas, and also a reputed wife, who immigrated with him through whom he succeeded in establishing his claim to a league and labor of land as the head of a family. The question then presented itself: to whom did the community interest in the land belong? to the lawful wife or to the reputed wife? Under the colonization laws, as they existed at the time David Babb came to Texas, a single man was entitled to one-third of a league of land, while the head of a family was entitled to a league and labor. The court held that since the policy of the law was to bring about the set-

tlement and to add to the population of the country, the reputed wife who came with the husband to the country and settled there and who constituted the member of the family, for which the grant was made to the supposed husband as the head of the family was to be considered so far as the grant of land was concerned as the lawful wife, and entitled to one-half of the land so granted. In his opinion Chief-Justice Hemphill says:

There is no proposition more clear or indisputable than that grants of lands to heads of families were made on the supposition that the family was a Texas and not a foreign family; that the family was in fact in Texas, and as such was the meritorious consideration of the grant. And although, by construction, the rigor of this provision has been relaxed to the extent that where an applicant has a fixed domicile in Texas, having broken up his domicile elsewhere, he shall not lose his right to a certificate, or grant, from the mere isolated fact that the family was not here at the accrual of the right, or at the time of the application for the grant. . . . Yet it has never been imagined that when there was a family in Texas recognized and admitted as such, and being the very objects that were the consideration of the grant and for whose benefit it was intended, the courts had authority, years afterwards, to look to foreign countries to ascertain whether the husband, etc., may not have left a family elsewhere. The family ought to have been here in fact, and in contemplation of law was here to authorize the grant, and if there were a family here at the accrual of the right to the grant, the members of that family, to the extent of the community right of the wife, or reputed wife, must take to the exclusion of claimants elsewhere, who in fact, formed no part of the family contemplated by the law as the proper recipients of the bounty of the government.

This gave the defendant who held the title of the reputed wife one-half of the unsold one-half, or one-fourth of the land. The question then arose as to the title to the remaining one-fourth. The title to that undivided interest was in David Babb at his death. His legitimate children were conceded to be entitled to inherit, but the further question was then presented as to the right of the lawful wife to claim any part of the land as an heir to his estate. The determination depended upon the Spanish law. After an elaborate discussion of the authorities, it was held that under the Spanish law, save in exceptional cases, she was not entitled to inherit any part of her deceased husband's estate.

The case of *Gautier vs. Franklin*,³ was a suit upon two promissory notes, one of which fell due on the 1st day of January, 1838, and the other on the 1st day of January, 1839, which were executed by Gautier in Florida. Gautier immigrated from Florida and became a citizen of Texas before suit upon the notes was barred by the statutes of Florida. The action was instituted in February, 1845. In defense of the action the defendant pleaded the statute of limitations of Florida, and also the laws of limitation of Texas. The statute of the Republic of Texas provided that no action should be brought against any immigrant to the republic, to recover a claim which was barred by the laws of the state from which he immigrated. It was held that since the action was not barred by

³ 1 Texas Reports, 732.

the laws of Florida at the time of the defendant's change of domicile, that statute did not apply. But it was urged in defense, that the suit was prescribed under the laws of Mexico, by which it was claimed that the action was prescribed in four years. It was held, that this proposition was not sound: and after an elaborate discussion of the point the conclusion was reached that the period of prescription under the Spanish law was ten years. By the act of the Congress of the Republic which adopted the common-law, the Mexican law of prescription was abrogated and a statute of limitation was not enacted by the Congress until 1841. Under this act the period of limitation for suit upon the notes was four years and one of them lacked but a few days of being barred under the statute. The opinion, however, applied the rule announced in *Ross vs. Duval*,⁴ "that it is a sound principle, that where a statute of limitation prescribes the time within which suit shall be brought, or an act done, and a part of the time has elapsed, effect may be given to the act and the time yet to run, being a reasonable part of the whole time, will be considered the limitation in the mind of the legislature in such cases," and held that the action upon both notes was barred.

It has been said, though the present writer is not certain of the correctness of the statement, that Texas was the pioneer state in providing by legislation for the exemption of the homestead of a family from

⁴ 13 Peters' Reports, 64.

forced sale. The constitution of 1845 contained this provision:

The legislature shall have power to protect by law from forced sale a certain portion of the property of all heads of families. The homestead of a family, not to exceed two hundred acres of land not included in a town or city, or any town or city lot or lots in value not to exceed two thousand dollars, shall not be subject to forced sale for debts hereafter contracted, nor shall the owner, if a married man, be at liberty to alienate the same, unless by consent of the wife, in such manner as the legislature shall point out.

As has been said, Chief-Judge Hemphill was a member of the body of men who framed and adopted the constitution from which the provision is quoted; and his opinions on homestead questions, indicate that he believed in the beneficence of the exemption laws. In the case of Sampson vs. Williamson and wife,⁵ Williamson joined by his wife had executed a mortgage upon his homestead to secure the payment of a promissory note. The holder of the note brought suit to recover judgment for the debt and for a decree foreclosing the mortgage upon the land. Chief-Judge Hemphill wrote an opinion holding that a sale under a decree of foreclosure would be a "forced sale" and that this was inhibited by the constitution. Judge Lipscomb wrote a separate opinion concurring with Chief-Judge Hemphill in the result. Judge Wheeler briefly noted his dissatisfaction with the conclusion of the majority of the court.

The suit of Shepherd vs. Cassiday⁶ was brought

⁵ 6 Texas Reports, 102.

⁶ 20 Texas Reports, 24.

by Mrs. Cassiday to recover a lot of land which at one time had been occupied by her as the homestead of herself and her children. She removed to a neighboring city, but acquired no other homestead. After her removal the lot was levied upon as her property by virtue of an execution against her and was sold and conveyed by the sheriff to the defendant. The trial court instructed the jury, among other things, "That an abandonment of the homestead for an indefinite time, with a present intention of returning at some future day, is not such an abandonment as would render the property subject to forced sale." The opinion was delivered by Chief-Judge Hempill. As illustrating his belief in the wisdom of the homestead law of Texas, we quote the following extract from his opinion:

We do not intend to assert the proposition, that the old homestead remains until a new is gained. This would perhaps too much embarrass and obscure the condition and rights of property, to receive judicial sanction; there being no law or statute to that effect. But while this is admitted, we must remember the wise and beneficent purposes of the homestead exemption; that it was intended to secure the peace, repose, independence, and subsistence of citizens and families: that it was placed beyond the reach of creditors, an asylum upon which they might gaze, but which they could neither enter nor disturb; a right so strongly secured, founded upon such high public policy, can not be lost by the mere absence of the party or family intended to be benefited. The homestead is not to be regarded as a species of prison bounds, which the owner cannot pass over without pains and penalties. His necessities and circumstances may frequently require him to leave his homestead for a greater or less period of time. He may

leave on visits of business or pleasure, for the education of his children, or to acquire in some more favorable location, means to improve his homestead; or for the subsistence of his family; or he may intend to abandon, provided he can sell. But let him leave for what purpose he may, or be his intentions what they may, provided they are not those of total relinquishment or abandonment, his right to the exemption cannot be regarded as forfeited.

One of Chief-Judge Hemphill's most extended opinions, was written in the case of *Wright vs. Wright*.⁷ It was a suit for divorce brought by the wife. The ground of the action, was cruel treatment. The statute provided that a divorce should be granted, "when either the husband or wife, is guilty of excesses, cruel treatment, or outrages toward the other, if such ill treatment is of such a nature as to render their living together insupportable." The allegations of the petition setting forth the cause of action were as general as the language of the statute and failed to specify any particular act or acts on part of the husband, which constituted cruel treatment. A general demurrer was interposed to the petition but there was no special exception for vagueness of allegation. The wife obtained a decree for divorce. There were many questions of practice discussed in the opinion, but the most important inquiry was whether the allegations in the petition were sufficient to admit evidence of acts of cruel treatment. Without holding that the same rule would apply in cases other than divorce, it was held that in a case of

⁷ *Texas Reports*, 168.

this character the trial judge should have excluded the evidence and dismissed the petition. The opinion ably discusses the point and reviews numerous decisions in support of the conclusion.

The case of Arberry vs. Beavers⁸ is noteworthy as being one of the very few cases in which Chief-Justice Hemphill wrote a dissenting opinion. It was an action to compel the Chief-Justice of a certain county in Texas to receive the returns of the votes of certain precincts in the county, of an election for fixing the county seat. The trial court awarded the writ. The Supreme Court reversed the judgment and dismissed the case. Chief-Justice Hemphill concurred in the disposition of the case, but in a vigorous opinion dissented from the propositions laid down in the opinion of the majority that the chief-justice of the county had the discretion to refuse to receive the returns and that therefore he could not be compelled by the writ of mandamus to do so. After showing that the writ had been awarded against other officers who had to ascertain certain facts, before they could be called upon to act—notably the Commissioner of the General Land Office, who had been forced by mandamus to issue patents and the like, he added:

We have determined that no man shall be deprived of his lands from the mistake or errors of the Commissioner in the construction of the law. The elective franchise is equally sacred, equally dear, and in my opinion we should hold that none should

⁸ 6 Texas Reports, 457.

be deprived of their votes from the ignorance or mistakes of the officers whose duty it is to count and declare the result of the election.

In selecting the opinions in the foregoing cases for comment, I would not be understood as implying that they are the ablest and most important opinions written by Chief-Justice Hemphill. Indeed, anyone who will make a critical examination of his judicial utterances, will be impressed with the fact of their uniform excellence. Almost every one, if not all, exhibits a painstaking care in the examination of the authorities bearing upon the points and an elaborate discussion of the questions involved. The style is ever elevated and not only clear but luminous. As a whole they exhibit a disposition on his part to give full scope to the principles of our equity jurisprudence: and show, that he was profoundly impressed with the justice and equity of the rules of the Spanish law. In cases involving that law, he examined with care and discussed with elaboration all the authorities to which he had access: and even in deciding questions of common law, he was prone to make excursions into the domain of the civil law in order to illustrate some principle or to fortify some conclusion.

It is appropriate that something should be said as to Judge Hemphill's social character and demeanor and as to his deportment upon the bench. I cannot better portray his characteristics in these respects than by quoting from the remarks of O. M. Roberts,

himself a distinguished jurist and statesman of Texas. Having been Judge Hemphill's associate on the bench of the Supreme Court for more than a year, there was probably no one at the time at which he spoke more capable of giving a just portrayal of his traits of character and conduct. Having been deputed by the bar of the capital of the state to present to the Supreme Court a portrait of Judge Hemphill, among other remarks, Judge Roberts said of him:

His likeness, exhibited in this room, should inspire both the bench and the bar to imitate the wisdom displayed by him as Chief-Justice of this court during the period of eighteen years. He, by his education, his patient industry, and his conservatism, was peculiarly fitted to fill his position as the head of this court in the great work of laying the foundations of, and of giving shape to, the jurisprudence of Texas during the early period of its existence. The scope of rights and wrongs to be investigated and decided was very broad and various, embracing those arising under the Spanish civil law and laws of the Indies while Texas was a Spanish province; those under the laws of Mexico, and the State of Coahuila and Texas, and those under the Republic of Texas, in which the common law of England was adopted in 1840, and those under the laws of the State of Texas as a part of the United States after 1845. Parts of all the system of laws, in modified form, were retained and blended in one ever-changing body of laws to be passed upon. To harmonize them consistently required the calm, deliberate judgment, the extensive research, and the studious habits which characterized his whole life while on the bench.

In this he was greatly aided by his early associates, Justices Lipscomb and Wheeler. They were both able jurists, though very different in their habits of thought on legal questions and in their

mental organization, that led to differences in their conclusions, which often called into requisition the conciliatory influence of the Chief-Justice.

As in other new countries, the statutes enacted in Texas were often crude in structure, and the acquisition of rights under the laws was attended with many irregularities. These things required extensive and accurate knowledge of the habits and pursuits of the people of Texas through a long series of years, combined with a politic conservatism on the part of the court of last resort, to prevent the continual unsettling of rights long deemed secure. This marks the course of the Chief-Justice, generally sustained by a majority of the court. The favorite subjects selected for his own investigations were those arising under the institutions and laws of Spain and Mexico, for which he was well qualified by his knowledge of the Spanish language; under the laws relating to marital rights, to marriage and divorce; to homestead rights, and to other exemptions from executions. With most of these subjects the lawyers of the State were least familiar, and authorities upon them were not generally accessible.

He was one of the few judges that have been on the supreme bench who gave very careful attention to the literary excellence of his written opinions. In consequence of this, and on account of the great care and deliberation given to his subjects, he did not deliver as many opinions as either of his associates, he not having delivered more than about five hundred in the eighteen years during which he was Chief-Justice, from 1841 to 1858.

He presided in court with a rather austere dignity, and gave to those addressing the court a respectful and silent attention, rarely ever asking a question of the counsel in the case being presented. When he spoke to all on the bench, his words were few and his manner positive. In his intercourse with the members of the bar he preserved a reserved dignity that, though hardly repulsive, did not invite familiarity, yet he was a man of kindly and friendly disposition generally, with remarkable uniformity in his manners and general bearing. It may be said of him that dur-

ing a long period of public service he was known to his fellow citizens generally only by his public acts in the service of the State to which he earnestly devoted his life. When, after his health had been impaired by his recluse habits of study and arduous labors, he was elected to the Senate of the United States, he left his long occupied seat on the bench with evident regret, to enter the political arena at a stormy period not in accord with his serene habits of thought and action; but his State called him to that station, and he answered the call.

He spent a solitary life, without a wife and without relatives, in the State of his adoption, whose prosperity and greatness he loved and worked to achieve. It is due to him, in commemoration of his usefulness and devotion to Texas, that his remains should, as they do, rest in the State cemetery, with a modest and becoming monument marking the spot where he lies, and that this likeness of him should be suspended in the room of the Supreme Court, where his presence always commanded the respect due to his exalted position as the Chief-Justice.

To these remarks Chief-Justice Willie responded in part as follows:

I am not capable of improving upon the analysis of the character of Judge Hemphill, so ably made by his distinguished colleague. I can but bear testimony to its correctness from my own knowledge of the man and of his writings. Although I knew him as the young lawyer knows the judge before whom he practices, my judgment of his ability is derived from a study of his opinions—my knowledge, that under the appearance of coldness and austerity he carried an amiable heart, comes from an association which he was pleased to encourage.

Such of Judge Hemphill's contemporaries as still survive—among whom are two very eminent retired members of the bar—bear the same testimony as to his personal characteristics.

The first Supreme Court of the State composed of Chief-Justice Hemphill, and Associate-Justices Lipscomb and Wheeler, is denominated by the bar, with affectionate reverence, as "The Old Court." To it is justly given the credit of having with scant materials molded our jurisprudence into a form it has ever since retained; and its members are universally esteemed for their learning and ability as well as for their exalted personal qualities.

It may be safely said that to no one of the eminent trio, is more credit due, than to Chief-Justice Hemphill.

JAMES LOUIS PETIGRU.

JAMES LOUIS PETIGRU

From a painting in the Supreme Court Room at Columbia, North Carolina. The painting is a copy executed by Mrs. Carson, a daughter of Petigru, of a painting by Thomas Sully.



JAMES LOUIS PETIGRU.

1789-1863.

BY

JOSEPH DANIEL POPE,

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IT is desired that a brief sketch of the career of one of the most illustrious citizens in private life that this country has produced, should be written and preserved for the benefit of posterity. The character of such a man, distinguished as he was for his talents, his learning and his personal worth, becomes the heritage of those who come after him and serves as an example and an incentive. The outline of this life and character we shall endeavor to portray not only as a labor of love but with a feeling of veneration for the man as he lived in his day.

James Louis Petigru—the subject of this sketch—was born in South Carolina on the 10th of May, 1789, at Little River in the County of Abbeville, and was the oldest son and the first-born of eleven children of William Petigru and Louise Guy Gilbert, his wife; the father being of Irish extraction and the mother of Huguenot descent. Her ancestor, the

Rev. Jean Louis Gilbert, led the last of the Huguenots to South Carolina. To use the words of another, "He established his flock in Abbeville at what they called New Bordeaux. They were strangers in a new land and endured many hardships. But the Huguenots were industrious and frugal; they seldom failed to succeed." James Louis inherited from his forebears the great characteristics of both nationalities—the courage and ready humor of the sons of the Emerald Isle and the wit and vivacity of his charming mother, who carried in her veins the Huguenot blood. Of this noble mother it is said: "She was as charming in person as in character—a brunette with a smooth delicate skin, soft hazel eyes, dark brown hair, a figure of medium height well-rounded, with exquisitely formed hands and feet." The son of whom we speak inherited many of these great qualities of head and heart from this mother, who was as good as she was beautiful.

Mr. Petigru's career was comparatively uneventful. It is true he occupied the highest position that a citizen could occupy in the society which he adorned—he was a great man in private life. In a word, he was the great lawyer and the great citizen. But still the incidents of a political career are wanting. He never occupied high public station and yet he was a statesman. He never held judicial positions and yet he was a great jurist. He never wrote books and yet his life itself is a volume fit to be a study. He never founded a charity and yet he was a great-

hearted philanthropist. He needed no official trappings, for without them, he was intrinsically great. He was the greatest private citizen that South Carolina has ever produced. It is of such a man we are asked to speak.

The keynote of Mr. Petigru's great and lovable character can be sounded in alternative phrases of a few words: He was not perfect; he was no saint; he was all human. There was about him a touch of "Nature" which is said to "make the whole world kin." This was the reason why men and women, old and young, rich and poor, white and black, so loved him. He did not stand upon a pedestal so high that humble folk could not touch the hem of his garment. The mantle that fell from him here on earth was white, and if it was not spotless, the spots upon it were as the spots upon the sun. And herein what words shall I employ to convey to an after generation a true idea of this many-sided man, as he walked and talked and lived and acted among his neighbors in his own day? Shall I say that Mr. Petigru was a genius? What idea will that convey of the man as he was in the flesh? Surely none. Some persons, perhaps many, would say that Tennyson the laureate and the lord, was a genius. Does that give us an idea of the man as he lived among men, in his day? Campbell the poet, was a genius; Wordsworth was a genius; Shelley, himself the skylark of English song, was a genius; how does this convey an idea of any one of them? How does it present to the mind's eye

the living presence of the one or the other of them?

Doctor Johnson the great lexicographer was a genius—he wrote “The Vanity of Human Wishes;” but does this give us any true conception of the purblind old Tory, who loved the church and honored the King? Surely a vague conception only. On the other hand turn if you please, to his written life by Boswell (the latter himself a genius, in spite of the exaggerated vulgar vituperation of Macaulay) and we have at once before us the burly, big-hearted, though bigoted and prejudiced old Britisher, who hated Scotland and despised the Scotch. We have here presented to us the anecdote, the repartee, the biting sarcasm, the dogmatic asserting, as they fell from his lips. We know him just as if we had spoken to him this morning, blundering along Cheapside. We behold him in person. We see the autocrat of his literary club. We hear the great epigrammatic talker before whom even Burke was silent. We see him as he lounged about in his great arm-chair and we hear him say: “Sir, I like a good hater,” or we can hear him as he holds forth on the posthumous fame of great authors: “Sir, good ink like good wine loses nothing by its age.” Again we can hear him as he repeats the witticism of Garrick and applies it to a great contemporary: “He writes like an angel and talks like ‘poor Poll,’ ” and we join in the laugh with that contemporary, when he retorts: “Tell him for me that he makes all his ‘minnows’ talk like whales.”

Thomas Carlyle was a genius: he has written tomes about Cromwell and Frederick; but what clear conception does this give us of the rough-hewn irascible old Scotchman whose bark albeit was believed to be worse than his bite. We must again answer, none.

But on the other hand, turn, if you please to the sketch of his own life written by his own pen (which his literary executor instead of being praised and thanked, has been criticized and condemned for publishing), and we shall have, to the life not the great writer, but the man; the egotistical fault-finding, ill-tempered, dyspeptic snarling Diogenes, who lived Chelsea way and thence dogmatized to the world; and there, too, we have in real life the overwrought, unhappy Jane, his long-suffering wife.

Placing Mr. Petigru in the company of these great people who, in a sense, still live, we opine that he should have written with his own hand the incidents of his own life for our delectation or he ought to have been so fortunate as to have had a second Boswell to record them for him. What a volume it would have been! What an education to have had jotted down for us ready at hand, the continuous flow of his spontaneous talk. And such talk! So rich, so racy, so varied, so pungent, uttered here and yonder, in the streets, in the office, in the Court room, in the stage coach, on the steamboat, at Steward's Coffee House in Tradd Street; and above all, his magnificent table-talk in his own house, where he loved to receive his

friends; and in turn, at the table of these friends, where he was always a welcomed and honored guest.

Shall I say that Mr. Petigru was a wit, a humorist and a man of eloquence? How much nearer would this bring us to a knowledge of the real man? True, one may read and learn to appreciate his elegant precision in the use of words, and this one may find amply illustrated in his codification of the Statute law of South Carolina and in his charming and learned essay on Equity. True, we may read and admire the beautifully rounded periods as they dropped from his lips in the orations that he delivered at the Semi-Centennial of the South Carolina College, and on many other literary or festive occasions. What then? You may print the words, but how are you to print the thunder and lightning? How are you to print the tempest of his passion, when bareheaded, if we may so speak, he went forth into the midnight storm, and spent himself, without reward, or the hope of reward, in the defense of the rights of the poor, the feeble, the helpless, the wronged and oppressed.

This intellectual passion was a striking feature of Mr. Petigru's mental structure. It is in the struggle of contending passions of man's intricate nature, that one may discover the inherent quality of genius. It is in the dealing with contending emotions that the master is displayed. Mr. Petigru illustrated this great quality to a most remarkable degree. Hence his redundant, varied and picturesque eloquence.

On one occasion I asked a distinguished life-long and by no means friendly rival (we refer here to Mr. Benjamin Fanuil Hunt, a native of Massachusetts, but a life-long resident of Charleston, and a lawyer of great power in his day), what quality gave to Mr. Petigru his acknowledged preëminence. He answered in these words:

His learning is great, but it is not that; his reasoning faculty is large, but it is not that; his industry is untiring, but it is not that; it is his quaint, original, magnetic eloquence. When his feelings are enlisted he is the greatest public speaker I ever heard; and I have heard them all.

It was my good fortune on another occasion to test the accuracy of this generous praise. It was on the return of that accomplished orator, William C. Preston from Washington (after he had failed of a re-election to the United States Senate) at which time the very small but highly respectable Whig party in Charleston, determined to receive the defeated Senator with great demonstration. Mr. Preston had been elected to the Senate from South Carolina as a Nullifier, and he returned to us, a Henry Clay Whig. This seemed to be an unpardonable offense, and yet the reception given to him on this occasion was grand, the great gathering being composed almost entirely of Democrats who had supported Van Buren. I was taken somewhat by surprise at this demonstration, and subsequently asked a competent judge (John A. Stuart, the great editor of the Charleston "Mercury") how many Whigs there were in Charleston?

With his ready wit, he answered: "Well, counting noses, Whigs and Whigings together, about sixty-five, of which legion Mr. Petigru is the leader." But it should be stated that Mr. Preston was to speak of course; Mr. Hugh S. Logan (soon after a member of Mr. Tyler's Cabinet as Attorney-General, and subsequently holding at the same time that office and the position of Secretary of State); Richard Henry Wilde of Georgia, the orator Jurist and poet (the author of "My Life is like the Summer Rose" and the translator of "Tasso"), and lastly Mr. Petigru. It goes without saying that all the prior speeches on the occasion were superbly elegant. But it was assigned to Mr. Petigru to speak last; and he beat them all; his wit, humor, and wealth of expression and of illustration bore off the palm. I remember as a youth sitting in the audience, the glittering shaft that he hurled at Mr. Calhoun, who on his way to Washington, a short time before had received an ovation in the proud old city. We can recall Mr. Petigru's utterance at this point word for word:

This dear old State of ours reminds me of a refined, rich, fat, lazy old planter, who took his wine at dinner and his nap in the afternoon, who employed an overseer of unsurpassed abilities, and turned over the management of his large estate to him. One morning the planter woke up and found the overseer master of the plantation.

Thus he proceeded to the end from height to height amid roars of laughter and rounds of applause. And

this too, be it remembered, was from a South Carolina audience of Calhoun Democrats. Not only so; our South Carolina people are a peculiar people. Mr. Preston's political career was of course ended; but he was in a very short time thereafter elected President of the South Carolina College, where he would teach his political faith to the rising generation. His charming eloquence and delightful manner gave him a personal popularity which seemed to be greater than his political short-comings. That was, let it be remembered, within the domain of John C. Calhoun.

But to return to Mr. Petigru. In estimating his power as an orator, his scholarly attainments should not be overlooked. At the Willington Academy under the famous Dr. Moses Waddle, he stood first. At the South Carolina College from which great seat of learning he was graduated in 1809, he bore off the highest honors. For the few years that he subsequently taught school while preparing for the bar, he was so successful that it caused his friend, Mr. Grayson, to say of him, "Had he pursued this as his calling in life, what a President of the South Carolina College he would have made."

In a very short time after he was admitted to practice, he ranked among the first, and became for years the acknowledged head of a bar distinguished for its learning and eloquence. He loved the classics; he loved English literature no less than he loved English law; he was thereby enabled to embellish his

speeches with exquisite turns of expression and apt quotations. Had he lived in the early years of the eighteenth century it is easy to imagine that his great nature would have expanded like a flower in the congenial atmosphere of the wits of Queen Anne's time. How he would have loved Addison! How he would have been drawn to poor Dick Steele! How he would have admired the genius and pugnacity of the author of "The Rape of the Lock," even though he may have despised this duplicity! How he would have taken in the scholarly law learning of Murray, afterward more famous as Lord Mansfield. Even in his college days he indulged at once his satire and love of poetry; and as an illustration we take his almost instantaneous reply to a fellow-student's disparaging lines on the merits of Pope as a poet:

Pity that scribblers should aspire
To write of Pope without his fire;
To criticize in witless lines,
The wit in every page that shines;
To chide in verses dull and tame
The poet's verse of endless fame;
His task assail in tasteless strains,
And earn a Dunciad for his pains.

'And perhaps many would prefer this effusion, addressed in very early life, to a young lady of whom he was enamored, from the same pen:

THE ALOE.

Though bitter the aloe, 'tis pleasant to gaze
On a plant of such wonderful birth,

That blossoms but once, on the limited days
Allotted the children of Earth.
And such, lovely maid, is the passion I prove,
Yet, Oh! it depends upon you,
Whether doomed to endure like the aloe — my love
Must be like it — a bitterness too.

In a note to a friend he asked, "How do you like them? Short and sweet, aye! Epigrammatic forsooth! Tell me your opinion. I suppose Tom Moore has reason to complain of the first stanza."

The bitterness of the aloe was his. It is said that the young lady to whom they were addressed was not responsive. Perhaps she was proud; perhaps he was poor. He had not yet made a great name. His wit and eloquence were not yet the talk and admiration of the festive board. But what may it have been afterward? What, when his foot was on the topmost round of the social ladder?

Still, in his early life, when he was yet but a young lawyer, his contemporary, Mr. William J. Grayson, a college chum and a life-long friend (himself a writer of exquisite grace and elegance, a poet after the manner of "The Deserted Village," a member of Congress and of charming, conversational gifts) tells an anecdote of Mr. Petigru in these words:

He was, on one occasion, assaulted in the court yard with the most violent abuse, by a brutal fellow who lavished upon him all the foul epithets and appellations he could remember or invent, of which rogue and scoundrel were among the most moderate. Thus assaulted, he stood unmoved with a half smile of amusement on his face. At last this noisy bully, having exhausted his ordi-

nary vocabulary of abuse bethought himself of a term of reproach which at that day comprised everything hateful — he called him a "damned Federal." The word was no sooner uttered than a blow, altogether unexpected by the brawler, laid him in the sand. He became as quiet as a lamb and moved away without comment. But an old gentleman present, one of the remains of the defunct Federal party, thought the proceeding a sort of imputation on his old creed. "How is this," he said to Petigru, "you seem to think it a greater offense to be called a Federalist than to be called a rogue or rascal?" "Certainly," was the reply, "I am not hurt by being abused as a rogue for nobody believes the charge; but I may be thought a Federalist readily enough and be prescribed accordingly; and so I knocked the man down by way of protest against all current misconstructions!"

This anecdote not only gives the keynote to Mr. Petigru's politics, but to his character as a man as well. Mr. Petigru always was a Federalist, but at that early age not openly avowed.

Shall I say that Mr. Petigru was a man of robust energy, of prompt action, of dauntless physical and moral courage? Shall I say that he feared no man, and shirked no responsibility in the vindication of the right? This was his natural inheritance. The cross between the Huguenot on the one side, and the Scotch-Irish on the other side, is a guarantee that the fighting instinct is not dormant. It was not in his nature to halt like Hamlet in the play between two opinions. When his judgment prompted him to action, he boldly took the responsibility. He did not pause to soliloquize. He did not stop to balance the question, to do or not to do, but he was always ready

at the right time, in the right place, and in the right manner, when the occasion arose and he would promptly

Take up arms against a sea of troubles
And by opposing, end them.

He did not pause to weigh the consequences to himself when he boldly confronted wealth and social influence, prejudice and angry passion, as when he brought an action for damages for one Smalley, a helpless Yankee tramp, supposed to be an abolitionist, who on the pretended charge of larceny had been convicted and sentenced by a Court to be whipped at the whipping post. For this grievous fraud upon the law, Mr. Petigru's indignant and pathetic eloquence wrung from a jury at the Capital of the State, a compensatory verdict of several thousands of dollars, which was promptly paid, and as promptly handed over to the plaintiff by Mr. Petigru, without charge for his services.

He did not stop to count the cost when solitary and alone he exposed his person to an angry mob in Charleston which was already in action with concerted purpose to mob a negro chapel at the corner of Wilson and Beaufain Streets, which purpose Mr. Petigru by tact, eloquence and courage, arrested in mid-career by saying to them in a vivid harangue: "Men, let us call a meeting, if you are right, I will go with you; if you are wrong, you will carry out your purpose over my dead body."

He did not stop to count the cost when he, aided by Joseph H. Dukes (who afterward became a citizen of New York) and Charles H. Simonton, then a young lawyer (subsequently a Circuit Judge of the United States) instituted proceedings in the nature of ravishment of ward to establish the freedom of Archy and John, two colored pilots in Charleston Harbor, upon the ground that for very proper reasons, these quadroons with their mother had been emancipated under the humane provisions of the Act of the Legislation of the State passed in 1800. The suit failed for want of evidence, but Mr. Petigru believed he was right; he believed that they had been unjustly deprived of their liberty, and so believing, he struck, in their behalf, for their freedom.

He did not stop to balance the consequences when he took up the cause of the illegitimate children of one George Brood, a foreigner, to whom their father had secured practical freedom through the instrumentality of a secret trust. Mr. Petigru having reason to believe that the secret trust was in bad faith, about to be violated by some of the heirs at law of the deceased trustee, caused proceedings to be instituted in the name of one Ford the Escheator and (there being no next of kin of the deceased testator) he caused the whole property to be escheated to the State; and this done, he proceeded to procure, by his personal influence, the emancipation of these persons by an Act of the Legislature.¹

¹ Lee, *Statutes at large*, vol. XII, 416.

Why, it may be asked, did Mr. Petigru take so active a part in matters of no personal concern to himself? To a nature like his, it was enough that the parties were poor and friendless and wronged. These things furnished a sufficient reason. His sense of right rebelled against the injustice, that those who were intended to be practically free should by a breach of moral duty, be reduced to a condition of absolute servitude. But there was a potential reason behind this. Born and brought up as he had been in a community where property in negro slaves was recognized by law and by the Constitution under which he lived, he none the less hated slavery. And yet he was no abolitionist; he was no whining fanatic; he did not believe the negro equal in any respect to the white man. On the contrary he himself owned slaves, and was at one time the master of a large number of them. Speaking now in the first person and of my own knowledge, I have heard Mr. Petigru say that concerning the negro's condition in this country, the happiest lot for him was to belong to some humane master whose interest it was to protect him as property, and thus secure for him the enjoyment of those few rights which the law allowed him. He hated slavery, not in its domestic aspects, but as an institution. He hated human bondage as the antithesis of human liberty. He hated the mercenary skipper who brought hither these unhappy captives in war and sold them into bondage, for Mexican dollars and Spanish doubloons. He

hated the negro trader who bought and sold the negro as if he were a mere chattel, and for profit separated the husband from the wife and the parent from the child. But he could not and did not hate the humane masters (of whom he was one) who bought with his own money the already captive African slave when the relation was recognized throughout the world, or who took him as an inheritance. He could not hate the master who in that relation fed and clothed and sheltered the slave; who civilized him; who christianized him; who taught him to reject the fetish rites of the savage and to join in the praises of the living God. And some day not too far in the future, the southern slave owner now glibly denounced as the cruel taskmaster will be recognized as the human agency permitted by the Almighty to work out the redemption of the negro race and through this means to civilize the great continent that now lies in darkness, a prey to the cupidity of foreign adventurers and the ambitious greed of foreign powers. It was in this connection and on this line of thought that a few days after the firing upon the Star of the West in Charleston Harbor, and the recognition of flagrant war, I happened to be in Mr. Petigru's office on business, he said to me "I never believed that slavery would last a hundred years; now I know that it will not last five." I am very sure that the wish was not father to the thought and while the question of slavery was by no means an issue, yet it was Mr. Petigru's

deliberate judgment that the institution as it then existed, would perish in the conflict, no matter which side should prove in the end to be successful.

This leads up to the question: What were Mr. Petigru's political opinions? Here again is presented the difficult task I have assumed. He held no political position, and left behind him no speeches on great political questions; no published letters discussing political measures; no recorded vote which would silently indicate his preference for any particular public policy. He was simply a highly-gifted, hardly-worked lawyer, winning his fame and his money by his forensic efforts. And yet his political opinions were well known and, although upon the unpopular side, he was always ready to avow them. Had he moved with the current and espoused the popular side, what a splendid figure he would have presented to the world as a Senator in the Senate House of the American Congress!

But it may be asked how did it so happen that with his popular manners, his high education, his great learning and his commanding talents, he was not called into the public service and honored with high political station? The answer is at hand. Let it be premised that Mr. Petigru was at all times in favor of law, of order and of established government. He bowed to authority. His test of good citizenship might be expressed in one word—obedience. Hence had he lived in the American Colonies at the time when the incipient movement against the crown was

rising like a dark cloud in the sky, it is easy to believe that he would have sided with the King and the existing colonial government, as did so many of the prominent and wealthy people of his native state at the beginning of the contest; that he would have ranked himself among the "loyalists" as they were called; that he would have opposed the Revolution until a blundering ministry and a wooden-headed King had driven him to cast his fortunes for weal or woe with his struggling countrymen. The "rebellion" ending in a success, and therefore sanctified by it, he would have been among the first to call for the ordaining of a Federal Constitution, in order to secure thereby "a more perfect union." He was born contemporaneously with such a constitution, and living as he had under it, he believed that it established a government and not a mere compact between the states. In this he was even at that early day in a lean minority, North and South; but all the same he died in the faith. Thus Mr. Petigru seemed to have commenced life in a minority; he certainly lived in a minority and he surely ended his days in a minority. Of Mr. Petigru it may be said that in his early life he was a Federalist after the School of John Marshall, rather than that of Hamilton and Jay, who may be ranked as extreme nationalists, or consolidationists. But with whatever school Mr. Petigru may be classed, he certainly was not of the school of either Jefferson or Calhoun. Hence with his political opinions he could

not hope for political advancement at the hands of the people among whom he lived and by whom he was personally reverenced and beloved. He could not hope for Federal preferment by appointment either to the bench or into the cabinet, because that comes not so much by merit as from the political influence that one is supposed to be able to bring to the party in power; and it was well known that Mr. Petigru had a very small political following within his own state or in the South. Besides, for sixty years political power was in the hands of a party with which Mr. Petigru had no sort of political sympathy. Once indeed in that great cycle of time, the friends of Mr. Petigru hoped that they saw a way opened for him to a seat on the Bench of the Supreme Court of the United States. Not, let it be understood, that Mr. Petigru was in any sense a seeker of the position. It so transpired that in 1831 he was a great leader and speaker against nullification supported as that doctrine was by men so illustrious for their talents as Calhoun and Hayne and McDuffie and Hamilton and a host of perhaps lesser, though shining lights not only in Mr. Petigru's own state but throughout the whole South. He had been the friend and advocate of General Jackson's administration when at one time it was assailed by the great trio Calhoun, Webster and Clay. It was therefore hoped that upon the death of Mr. Justice Johnson, he would be raised to that high position. He was then in the prime of his manhood, of easy for-

tune, of acknowledged learning and ability, and beyond all doubt the fittest in all respects to fill the vacant place. But why the hope?—Why the expectation? There was nothing (the nullification contest being excepted) in common between General Jackson and Mr. Petigru. General Jackson was a man of violence; Mr. Petigru was a man of circumspection. General Jackson was a fierce western Democrat of limited education but of vast ability; Mr. Petigru was a man of high scholarly attainment, of courtly manners, and of equal ability, though turned into a different channel. General Jackson was a man of war; Mr. Petigru was a man of peace. General Jackson was the first man to put it into the hearts of the American people to believe that a union of these states could be permanently secured by pinning them together with bayonets; Mr. Petigru, a union man all his life, believed that this unity could be accomplished only by mutual forbearance, by gentleness and the encouragement of good will and affection between the sections, North and South; and that so desirable an end could not be obtained by vituperative abuse and malignant misrepresentations. General Jackson, with his invading army, entered upon foreign territory and had caused two citizens of that territory, Arbuthnot and Ambrustar to be executed without law or military necessity; Mr. Petigru, had the opportunity been his, would have defended these unhappy men at the risk of his own life with all the power of his masterful eloquence, even

at a drum-head Court Martial. In almost every quality of head or heart, General Jackson and Mr. Petigru were as wide asunder as the poles. The appointment therefore as Supreme Court Judge fell not to Mr. Petigru but to Justice Wayne, a Georgian Democrat, then in Congress and a supporter of the President. The appointment caused great dissatisfaction, but the handsome person and the engaging manners of the appointee, won the day. Once again Mr. Petigru might have accepted high Federal office and the way seemed to be open to him in 1841—under the Whig administration that came into power under General William Henry Harrison, but that faithful old soldier died within a few weeks after his accession to the Presidency; and upon the succession of Mr. Tyler, the Vice-President elect, there immediately followed a departure from the principles upon which the election had been run. Then too, there was inaugurated a line of policy which was repugnant to Mr. Petigru's sense of honor, for he believed that Mr. Tyler had betrayed the party that had elevated him to office; hence Mr. Petigru in his letters and public criticisms denounced Mr. Tyler as a traitor. To form a just idea therefore of Mr. Petigru's opinions on matters of public concern he must be measured not by his own public conduct or public acts, but by the high moral tone of the man, and the well-known temper of his mind. What would have been his natural bias under certain conditions? With whom would he have sided? Where

would he have placed himself had he been a chief actor in the scenes that daily surrounded him? These are all questions that must be answered by a consideration of the great matters that seem in all time to have tempered the quality and guided the actions of illustrious men. I have sometimes placed him among historic characters and speculated as to what would have been his opinions guided by a high sense of public duty. Of some things we may be sure; he would have lived socially with the best; he would have enjoyed the good things of life that were set before him; he would have been no Puritan in thought or manner; but he would have been stern in his political faith, as was the elder Cato, without the harshness of that dogmatic old Roman.

But to come down to a later date, Mr. Petigru was opposed to secession in 1860. He was for the Union first, for the Union last, and for the Union all the time. I think I can see him now as he stood on one occasion in the Court of the United States before Judge Mcgrath. He was opposing a motion arising under the Confederate State Sequestration law. He had grown old and feeble and he was slowly sinking into the grave; but his body quivering in every limb, his eyes flashing, his voice ringing as in the days of his prime, I think I can hear him as he uttered these words: "I oppose this act of arbitrary power, for I was born a free man." I have seen him shed tears over the death roll of the killed in battle; and have seen his eyes kindle with pride

when he was told of the fighting qualities of "the boys in gray." Fortunately for him he died before the end came. Had he lived into the period of reconstruction after the dread conflict was over, I feel myself wholly at a loss where to place him or to conjecture where he would have placed himself. He doubtless would have been opposed to universal suffrage and probably would have used his influence against it. He never could have gained the consent of his own mind to permit the vote of a Daniel Webster to be negatived and neutralized by an ignorant negro in the rice fields of the Combahee swamps, who could neither read nor write nor comprehend the first principle of civil government, and whose only idea of authority was to obey the orders of the overseer. Such a condition is shocking to the human understanding. But failing in his efforts to persuade or convince, he probably would have accepted the situation in good faith and would have maintained to the last extremity the civil rights of the freeman before the law; but knowing him as we do, we venture to assert that never would he have given his consent to the enfranchisement of the recently emancipated slave, as well for the slave's own good as for the good of the victorious North, and for the good of the vanquished South; for the preservation of the whole Southern territory from the condition of the Island of San Domingo as we behold it to-day. And in doing this he would have been supported by all wise men North and South and

would have had on his side, the humane and patriotic counsels of the dead Lincoln had he survived to behold the occasion and the opportunity. This I believe Mr. Petigru would have done, as a private citizen without office or the wish for office; this he would have done I repeat as a private citizen, for the elements did not mix in him out of which you could have made a demagogue or a democrat. Hence he could not and would not have accepted office under Andrew Johnson when by a dire calamity he became President of the United States. Here too, Mr. Petigru would have found himself again in a minority. I have sometimes doubted whether Mr. Petigru believed in democratic government at all. I am inclined to believe that he preferred the government of England, a limited monarchy, to any form of government known to history. He liked (as I have heard him say) its stability, its conservatism, its love of order, its pure administration of the law, its respect for the rights of property, its staunch protection of personal liberty. He has been known to say in conversation that "had he been born in England, cart ropes could not have pulled him away." Of one thing we may be certain; no matter what might have been his political predilections had he been spared to live in South Carolina during the era of "good stealing" even in his old age he would have been among the first to raise the banner of revolt, upon whose folds would have been inscribed these words, "Let us march against the in-

vading robbers—let us turn the rascals out." What a man he was!

Passing now from Mr. Petigru's political opinions which were never popular in his native state (to which state nevertheless he clung with a devotion that can only be described as the love of a son, in the strength of his manhood to an aged mother) we turn to him as an individual, to his personality, to his character as a man from early life into old age. Here he was altogether charming, here he was respected and honored and loved by all. Mr. Petigru's great law practice carried him at times to the Court House town of every judicial district in that state and frequently into neighboring states. To-day, a half century after his death—should a stranger visit any of these haunts, he will still be regaled with anecdotes of what the great old lawyer said or did on these long-remembered occasions. He may possibly hear passages from his well-remembered speeches. It is somewhat remarkable that Mr. Petigru in his public speeches and in his conversations seldom indulged in anecdotes. There was always the merriment and cheerful laughter in whatever company he happened to be, but these arose from the wit and humor that came spontaneously from the man himself reminding one of "the web that the spider weaves." He was the source of anecdote in others, but occasionally he would relate some amusing incident of his own life. He possessed as we have said varied accomplishments but there was one

accomplishment that he never acquired. He was devoted to dancing and it was said of him that "his mode of dancing like his mode of talking and acting was peculiar to himself, he was sometimes more hearty and original than graceful." On one occasion it forced a smile from the ladies engaged with him in the dance, that was more obvious than polite. Perceiving this he instantly turned to a friend and said in a stage whisper, "Those ladies think I am dancing for their amusement whereas I am dancing altogether for my own."

Mr. Petigru was still a young man hardly more than entering upon life in 1812, when war with England was forced upon the country, in which South Carolina, through the influence of her distinguished representatives in Congress, Calhoun, Chevis and Lowndes took a leading part. Again in the minority Mr. Petigru used his personal influence which at that day was small, against it. The anecdote I am about to relate is true, for in after years he used to tell it himself and enjoy it like a schoolboy. He was at the time teaching school and reading law in the old town of Beaufort. The embargo was in force and Mr. Madison's gunboats were patrolling our coast. This gave rise to the notorious Hartford Convention—"blue light" its members were called. Mr. Petigru was a sort of "blue light" himself for he did not favor the war. He believed with John Randolph that two people speaking the language of Shakespeare and Milton could be far better em-

ployed than in slaying each other with the sword. One day an early friend of his by the name of Bowman, a one-armed man who possessed a comfortable estate, came to him, and said, "Petigru, I have a bottle containing a little of the best. It has run old Madison's embargo." "Bowman," said Petigru, "day after to-morrow is Saturday a *dies non*, for me; let's make a day of it." "It's done," said Bowman. So on the day appointed they procured a horse and an old Boston chaise, drove ten miles down to Elliott's ferry, crossed and went two miles beyond into an oak grove. I think I can see Mr. Petigru now as he used to tell it, and hear him say, "The luncheon was good but the brandy was better." So coming home late in the evening, between them, they let the old horse run away and they were thrown out just at the ferry. The ferryman dragged them on board of the flat boat. On a near acclivity lived a Mr. Smith, Mr. Grassy Smith he was called, a gentleman of great benevolence and withal something of a philosopher; he impaled bugs, gathered rocks, dabbled in chemistry, and knew something of medicine. Engaged in these engrossing pursuits, he turned his crops over to his driver and his driver turned them over to the grass; hence his name of Mr. Grassy Smith. Him the ferryman sought and told in consternation that two men were dead or dying in the flat boat. The old gentleman rushed down to the ferry carrying with him his surgical implements—a pair of tooth-drawers and a lancet. He laid hold

of Bowman's one arm and felt his pulse; he then turned to Mr. Petigru and felt his pulse carefully. Rising he turned to the ferryman and jerking his thumb over his shoulder said, "They are both drunk," and walked away. Mr. Petigru, raising himself as best he could on his elbow and extending his right hand touched his friend and said, "Bowman, that is what I call a man of discernment." He always in after life spoke of Mr. Grassy Smith with the profoundest respect and never came into his neighborhood without making particular inquiries about himself and family.

Shall I say that Mr. Petigru was noble and generous; that his heart was as easily moved to pity as a woman's; that his hand was as open as the day to melting charity; that he never forgot a friend or ceased to remember a kindness? When in early life pecuniary assistance was extended to him by a friend to enable him to complete his education at the South Carolina College, he returned the kindness not only by his success in bearing off the highest honors of the class, but he returned it in money by paying back the benefaction, dollar for dollar; and he returned it also in gratitude by erecting in after years a monument on the grave of his benefactor. I am indebted to Judge McGowan, late of the Supreme Court of South Carolina for a transcript of the brief and beautiful epitaph that now stands in a quiet country graveyard in the county of Abbeville: "Edward Collier a native of Lunenburg, Virginia, once the

master of these acres. To the memory of an honest man. Careful of his own without infringing upon others. Of mild temper and sterling courage. Kind to the poor, friendly to all. A humane master and a good neighbor. This stone is inscribed."

There was one accomplishment (if indeed it be one) that Mr. Petigru did not possess—the vociferous volubility of that peculiar American product, the stump orator. He did not possess what seems to be held by many in such supreme regard, a redundant fluency of speech. He would often pause upon the thought, turn it in his mind until he could present it in the most telling aspect; he would dwell upon the word or change it until he got the right one. With him there were no synonyms—he must have the right word in the right place, or he would reject them all until the right one came to fit his exquisite mosaic. A distinguished Georgian, himself a poet and an orator speaking in admiration of his fastidious taste said:

His quiver seemed to be always full; he would draw one arrow from it and if that did not suit, he would return it and draw another; and if that did not suit, he would draw a third; and if that was at last the right one, he would hurl it with prodigious effect into the very center of the bull's eye.

The description is at once truthful and graphic. And yet he held the attention of his audience often amid laughter with hooks of steel. What too, is most remarkable, whenever Mr. Petigru entered upon a speech-making campaign, as he did during

the nullification contest, he never repeated himself; he always contrived to have a new topic or a new presentation of an old one, to the astonishment and delight of his audience.

The various attempts to put Mr. Petigru upon canvas have not been eminently successful. There was a bust of him in plaster that was admirable. The Courtenay bust of him in the City Hall in Charleston I have not seen and therefore cannot speak of it as a likeness, but the people of the state owe a debt of gratitude to Mr. Courtenay for perpetuating in marble the memory of their illustrious countryman. The portrait of him by his accomplished daughter, Mrs. Carson (admirable as a work of art), which hangs in the Audience Room of the Supreme Court in the State House at Columbia, represents a man too large, too portly, too massive for the original. Mr. Petigru's elastic step and erect carriage even in advanced life made him appear taller than he was. His great muscular power seemed to make him larger than he was. His rather low but broad brow, his strong and massive chin, his magnificent dark grey eyes, gave dignity, character and intellectual vivacity to a face that would otherwise have been plain. There was upon his forehead a vein (wholly unobserved on ordinary occasions assuming something of the shape of the letter V), which in moments of high physical or intellectual excitement flamed out like a veritable scarlet letter. It was a danger signal—it said more plainly

than words: "Look out for the engine, when the whistle blows." His hand was a striking feature of his person. It was the hand of the orator, sensitive, shapely and tapering. I have sometimes thought that he was a little vain of it. Those of us who knew him well and heard him often will remember how he would exhibit it while speaking as he daintily helped himself to the contents of his golden snuff-box; how he would display it as he toyed with his spectacles in the course of his great arguments; how with it he would constantly brush back from his forehead his abundant dark brown hair which retained its color to the last and never lost its lustre. Speaking of his personal characteristics, the professional green bag, and his gold-headed walking-stick should by no means be left out of the picture.

But if these were remarkable characteristics of the man, what shall we say of that still more marked and striking characteristic—his voice? Did just such a voice before or since add to the originality of any other man? To say that it was remarkable is altogether too vague and indefinite. To say that it was peculiar does not convey the idea. That familiar French word "unique" comes nearer the mark. Can we think of the man without thinking of that voice or rather when his name is called do we not think of the voice first and the man afterward? Such a voice! At times it was shrill and discordant as the notes of a bagpipe. I have heard it in the pathetic as soft as the breathing of a lute. Let us recall his

touching appeal even to tears in the Habeas Corpus case before Judge Whitner at Charleston in behalf of the mother for the custody of her tender infant child. I have heard it on occasion roll like the swell of cathedral organs. Let us recall his splendid argument for the defense in the case of the State vs. Martin at the Beaufort session. I have heard it in passion crash like the blast of a bugle. Let us recall his grand burst of indignant eloquence in Smalley's case, in the Circuit Court of the United States sitting in Columbia to which reference has been already made. It seemed to vary with every emotion of the mind, as it did when in his argument in reply, he burst forth in his opening sentence: "Mr. Treville" (the opposing counsel in the case) "has called me an abolitionist." The voice was suited to wit, to humor, to ridicule, to pathos, to invective, to wrathful indignation as the occasion seemed to require.

Mr. Petigru's manners were warm, hearty, often impulsive, as we shall see, and sometimes bordering even into the hilarious; and yet no man stood more upon social form and ceremony than did he, the punctilio of etiquette; a courtesy he considered a breach of social duty, (I almost said a crime) and even the smallest matter would sometimes draw from him a mild rebuke. I remember on one occasion a young student in the office announced to him that "Colonel" Grayson had called. Instantly with an expression of assumed distress upon his face he said

to him, "Augustus, spare him. I am sure he never held a military commission in his life, and would feel like a daw in epaulets." On another occasion a student in the office had nursed a virgin beard into a hopeful growth. One day Mr. Petigru stopped; and with a twinkle in his eye looked at the young fellow and said to him: "Julius, shave—were you a young cornet of horse I should say nothing; but for one following a civic profession to carry a bearded face is not good form." I wonder what the mild old censor would say to-day to see a bearded parson in the pulpit and a bearded judge upon the bench. He would use as he often did a Latin phrase and quote the familiar aphorism—"Tempora mutantur et nos mutamur in illis."

Mr. Petigru hated rudeness of any kind and resented it. One day a deputy sheriff, doubtless a trustworthy official, had a paper to serve upon him at the office. The deputy who was a Hebrew opened the door without a rap or salutation, walked in and with a thump threw the paper on the table and then walked out and slammed the door after him. In an instant the danger signal was out, the scarlet letter was aflame and Mr. Petigru rushed to the head of the stairs and called to the deputy, saying:

Mr. G——, you have put upon me to-day an unpardonable rudeness, well knowing that I am a meek and patient man. It is well for you that Henry L—— is not here, for had he been here, he would have kicked you down the stairs; you good-for-nothing, ill-mannered lineal descendant of the impenitent thief. Now go,

Let us here present another side of this most interesting character. Here again we must draw upon another for the facts of our narrative. The incident arose and the unhappy consequence followed from the inordinate speculation and direful money convulsions of 1837. Mr. Petigru had taken no active part in the delusion but he did not escape the general calamity. He had lent himself to oversanguine friends who supposed that a fortune was at their finger ends. "In this hard pinch," to quote from another, "his outside friends were ready to stand by him." But their kindly offers Mr. Petigru declined. Some years prior to this period Mr. Petigru had engaged in the ordinary and legitimate proceeding of investing his professional profits in a rice plantation and negroes on the Savannah River. It was the approved Carolina custom in closing every kind of career. It was the condition that came nearest to the shadow of the Colonial aristocracy which yet remained." This mania of speculation raged until a commercial crisis arose and soon all parties stood astounded, amazed and ruined. Mr. Petigru found himself overwhelmed in the general wreck. He refused all offers of compromise. His answer to the creditors was, "give me time and I will pay the last dollar for which I am liable." The sacrifice of the estate on the Savannah River followed but it was not enough to meet the owner's losses; a large debt remained. "It was a terrible calamity, for he was no longer young, with many claimants on his

love and help. "The situation was encountered with manly energy, and after years of unwearied exertion the debt was paid." Mr. Grayson from whom we have quoted in this connection, says: "It required toil which few could have borne and which none but men of high honor could have undertaken to perform. His labors were various and widely diffused, sometimes in Columbia, sometimes in Milledgeville, in Washington, and Cincinnati, wheresoever professional engagements called him. Through severe cold in winter and heat in summer he toiled on with unflinching will and iron constitution until he touched the goal that he had resolved to reach in the attempt—he paid everything. He was more happy in this than Sir Walter Scott who devoted his life to the same object with a similar spirit but devoted it in vain." It was now too late in life for Mr. Petigru to restore his lost fortune. But he continued to live in the affection of his friends, and to receive the admiration of all men.

In the effort to present a life-like picture of this extraordinary man, there is an incident—not perhaps important itself—that should not be omitted. Probably it exhibits more of the personal traits of Mr. Petigru's individual "make up" than more important events would present. The incident referred to occurred while I was a student in his office. His large practice very often detained him at his office until a late hour of the night. One morning as I was sitting alone in the students' room at the round-table,

trying to "knock some sense" out of the "rule in Shelley's case," Mr. Petigru burst in at the outer door, omitting his usual kindly greeting, while he seemed to storm through the lower office and stamp his way up the stairs to his own room. I could not understand these unusual circumstances but exclaimed mentally: "Hie! What can be in the wind to-day?" In a moment Judge Gilchrist of the United States Court appeared and asked, with some apparent anxiety if Mr. Petigru was in. I informed him that he had just gone up to his room where a client had been awaiting him; and I invited the Judge to be seated. In a moment more the venerable Alfred Huger came in looking as distressed as if he had been summoned as chief mourner to attend the funeral of one of the Royal Family, and he took his seat. Almost within another second Mr. Grayson appeared and he, too, was seated. Within a brief time the client departed and these three gentlemen were conducted up stairs where they remained for several hours in consultation. There was certainly something wrong and "the boys" at the office immediately instituted an inquiry. It was ultimately discovered that in going home from his office after the curfew bell had been rung Mr. Petigru heard the low whimpering of a woman under the portico of St. Michael's tower. A woman was in distress and that was enough! He immediately crossed the street and found that a guardsman (as the police were then called) had under arrest a young

colored woman. She immediately exclaimed: "O! Master, my mistress was taken very sick and sent me to the doctor's shop to get her some medicine; they took some time to mix it, and before I could get back home the bell rung and here I am." "O! my friend," said Mr. Petigru, turning to the guardsman, "let the poor thing go. Don't you see that she is telling the truth; she has the medicine here in her hand; her mistress may be very ill or dying for aught we know; let her go." "No," said the guard, "she has got no ticket and I mean to take her to the guard-house." Instantly the words came, "Unhand her, you hound." "You are a hound yourself." The word and the blow. Mr. Petigru's arm struck out from the shoulder and the guardsman lay prone upon the pavement seeing other stars than those in the heavens. Turning to the servant girl he said, "Now make your way as fast as you can to your mistress." In a few minutes the guard sprang his rattle and Mr. Petigru found himself surrounded. He was taken immediately across the way to the guard-house. Colonel Frank Lance was Captain of the guard and knew at once that something unusual had occurred and rushed to the outer hall. To his astonishment he found no less a person than Mr. Petigru in the hands of the guard. He exclaimed: "What, Mr. Petigru, you here? You in this guard-house!" "Yes, Lance, they have me in limbo." "Mr. Petigru, it will never do for you to remain here, go home and get a good night's rest and appear here before

the Mayor's Court to-morrow morning." "Thank you, Lance," and he was gone. The next morning he promptly appeared, pleaded guilty and as promptly paid the fine. Hence his appearance at his office as already related; hence the prompt appearance of his friends. Of course it was expected that there would be an indictment for an assault and battery and most certainly a civil action for damages, but nothing was ever heard of the case afterward. Doubtless a healing plaster of great virtue was applied to and healed the wounds of the appeased policeman. Of this we know nothing and speak not. The whole affair was so much like Mr. Petigru. Two women were in distress, the one ill and the other helpless. His sensibilities were touched. His chivalric nature was aroused. He took the responsibility and determined to brave the consequences. It has been said that Mr. Petigru never did know the person in whose behalf he risked the guard house.

It has been said by one of the family that Mr. Petigru was deaf to the charms of music; and yet he enjoyed the opera and patronized it. It is probably true nevertheless that he would have relished more keenly the play of "The Merry Wives of Windsor" in the hands of a skilled performer. Be this as it may, he loved the beautiful in nature and in art. He loved the ocean, and on its shores he had built his summer residence. He loved flowers and as an evidence of this he purchased a tenement in St. Michael's Alley in front of his office, across the

narrow way; he tore down the old building and converted the grounds into a garden in which paths were laid out and ornamented with roses and other plants of beauty and variety. Think of an old lawyer surrounded with his dry and jaundiced law library desiring to have before his eyes these flowers that he could see from his office windows, and thus enjoy their beauty and fragrance in the midst of his daily toil! He loved trees and at "Badwell," his country place, the planting of trees was a pastime. It is said that he attached the names of his friends to these trees and thus kept up a companionship with those who had passed away. He loved the pathless woods and delighted to wander about in them alone and thus find a pleasure all his own. I remember that once on the eve of Secession Mr. Petigru and I happened to be fellow passengers on the steamer that plied the inland waters between Charleston and Savannah, and stopping at a landing place known as Whale Branch, the passengers were informed by the Captain of the boat, that for some reason, now forgotten, we should be tied up at the wharf for two hours. While others complained of the delay, Mr. Petigru took it in good part and turning to me he said: "I remember, while yet in my young days, wandering about these woods, that there was a huge oak tree somewhere about this neighborhood that was the wonder and admiration of everybody and the curious rode miles to see it; I should like to see it again." I answered immediately: "Why Mr. Pet-

igru we are within a-quarter of a mile of it and were it not for the bog and the briars you could be gratified."

He turned towards me with a smile and said: "What are bogs and briars in comparison with the pleasure of seeing again such a magnificent object and recalling again our early recollection. Let us go forthwith."

The way was really better than I had supposed it to be and in a few minutes we were upon the spot in the original virgin forests. I am afraid to give the measurements of that tree, it was so enormous. The old man stood for a moment with uncovered head. I could see the muscles of his face quivering with emotion. The branches touched the ground, and the gray moss hung in festoons from the great limbs so low that they could be touched with the hand. As he stood uncovered, he exclaimed: "Gray-bearded monarch of these woods, how old art thou?" Here he threw himself into one of the low branches and swept the ground which held him like a cradle and, more in soliloquy than in conversation, he continued: "How old art thou? How many Indian lovers have wooed their dusky mates in thy delightful shade? How many Indian hunters have kindled their beacon fires under these great limbs? Wert thou not there in thy old age when Rèbault anchored his ships in these great waters below us? Why not here when Columbus visited these western shores? How many of the great earth have died while you still lived!"

Why not as old as the cedars of Lebanon?" Thus soliloquizing, he suddenly turned to me and said: "Pray, my friend, have this great King of the forest measured in all its parts, and write me the dimensions of it so that I may have it published in the transactions of the South Carolina Historical Society."

This I did and employed an artist to have the great tree painted. These were forwarded to Mr. Petigru. The war immediately supervened. The "transactions" were discontinued and the last I saw of the picture was during the bombardment of Fort Sumter when I saw it in Mr. Petigru's office in St. Michael's Alley, all forgotten, unhonored and unsung. Surely the old chapter of events had closed and a new world had opened upon us.

Everything about Mr. Petigru was original even as to the manner in which it is said that he won his wife. I cannot vouch for the truth of the story for it was long before my day, but years ago it was the talk of the country side. He was now a young barrister of Coosawhatchie full of fire and genius, slowly but surely climbing up to the top of the hill. The lady's grandfather had driven his coach and four. Mr. Petigru was making his own way in the world still teaching his school in the morning, and attending to his profession in the afternoon and at night. One day he joined the sportsmen in following the hounds and was so fortunate as to bring down his first deer. Of course he had to undergo the ordeal of being "blooded." His face and hands were

blooded, his white vest and trousers were blooded. On returning home with these marks of honor upon him, the young lady catching sight of him supposed that he had been nothing less than mortally wounded and she fainted. When Mr. Petigru heard of this delicate sensibility of the lady he exclaimed: "What, she fainted for me?" In a short time the struggling young lawyer was upon his knees, and in a few months more wedding bells were ringing.

Another interesting anecdote will show us another view of this many-sided man. Mr. Petigru had years before removed to Charleston and had become famous. The scene was however in old Coosawhatchie. He had returned there as he often did, to argue on this occasion the great case of Taylor vs. Taylor turning on a question of domicil. I heard that great argument (able on both sides) and walking to the hotel I happened to join Mr. Petigru. He lounged along striking his green bag against his knee. In early life he had a friend living in that neighborhood whose prenomen was Sam (his surname is unimportant to the story). He and his friend Sam in early age had frolicked together; they had visited the girls together and together they had chased the wild deer in the swamps of the Coosawhatchie. His friend had connected himself with that highly respectable denomination of Christians who believe that a truly converted soul may fall from grace or might "backslide." Now Sam had "backslid" twice or thrice and Mr. Petigru knew it. As we

walked into the lobby of the hotel which was crowded, everybody stopped talking expecting to hear Mr. Petigru make some characteristic remark. At the moment he descried his old friend Sam and with hand outstretched, he exclaimed: "Why, Sam, how are you and how is all the fambly?" "Thank God! Mr. Petigru, they are all well; and I am happy to inform you that since I saw you last, my son Tom (the wild boy of the family) has joined the church." Mr. Petigru's eyes twinkled. One could see the ruby in his cheek, as he said: "Sam, I always knew that there was a sprig of piety in your family; but Sam, it is not an evergreen." This brought down the house and nobody joined in the applause more heartily than did good old Sam himself.

The sands in the hourglass that was intended to mark the limit of this sketch admonish us that it must be ended. It will be remembered that in December, 1860, the Secession Convention began its sittings in the city of Columbia in the Baptist Church, standing there as it does now on Plain Street. Mr. Petigru was at the time in the city attending the Court of Appeals. On his way to the Court with his green bag as usual, he was met by a plain countryman who accosted him with the inquiry: "Stranger, can you show me the way to the Lunatic Asylum?" "Yes, my friend, with pleasure; come with me." Arriving at the corner of Plain and Richardson Streets, he said pointing to the Baptist Church: "You see that building; it looks like a church but it is not a church;

it was a church but it is now a lunatic asylum; go right there and you will find one hundred and sixty-four maniacs within it at this very moment." I should not omit to state that I was perhaps one of the youngest of those members and there are some of these escaped lunatics still scattered about the state. I cannot vouch for the truth of this story but it was so like Mr. Petigru that it was accepted as true at the time and its authenticity was not then nor has it since been questioned. The witticism will pass; but I must nevertheless add in an aside: "Let the world wag; time will reveal where the truth lay."

But I will conclude by relating what I know to be true. The Convention adjourned from Columbia to Charleston and sat in St. Andrews Hall which was afterwards destroyed by fire. On the morning of the passage of the ordinance of Secession I was going down Broad Street and saw Mr. Petigru come up toward me. We approached each other at the City Hall and just at that moment the bells of the city rang in a general and gladsome unison. Mr. Petigru rushed up to me, exclaiming interrogatively: "Where's the fire?" I answered, "Mr. Petigru, there is no fire; those are the joybells ringing in honor of the passage of the ordinance of Secession. He turned instantly and said: "I tell you there is a fire; they have this day set a blazing torch to the temple of constitutional liberty, and please God, we shall have no more peace forever." In an instant he turned and was gone. He passed under the colon-

nade of St. Michael's Church. Within the precincts of which sacred edifice he sleeps his last sleep beneath a monument erected to his memory by filial love. Here in life he had worshiped and here in death he rests within the sound of St. Michael's bells which for more than forty years had called him to prayer.

ROGER BROOKE TANEY.

ROGER BROOKE TANEY.

1777-1864.

BY

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ROGER BROOKE TANEY was appointed Chief-Justice of the United States on March 15th, 1836, succeeding John Marshall. These two great judges presided over the Supreme Court for sixty-three consecutive years, and each has influenced profoundly our federal jurisprudence.

If Marshall saved the Federal Government from dying of inanition, Taney saved the states from death by absorption. It is due largely to the genius of these two great Chief-Judges that an indestructible union of indestructible states is due. Who, in this work, performed the greater service is a question that will be answered according to the political views of the person to whom it is propounded. That Taney worked nearer the understanding of the Fathers cannot be doubted by the student of our constitutional history.

Roger Brooke Taney was born on the 17th day of March, 1777, in Calvert County, Maryland.¹ His

¹ For the facts of Taney's life the writer is largely indebted to

maternal ancestors were English, and one, at least, was learned in the law. Richard Brooke (the first of whom we have any record), Gentleman, was of Whitchurch, Hampshire, and, as a brass erected in the church there testifies, died January 16th, 1593. That he was a man of means for those days is shown by his will in which he provides for distribution among his wife and children his "leases held by the Blessed Trinity in Winchester," his lease of Knoll, his woods in Chalgrove and Freefolk and the manor of West Fosburg, and his free lands and tenements in Whitchurch and Freefolk and his lease of the parsonage of Whitchurch.² This parsonage was the homestead and was still standing firm and sound in 1897.³

Thomas Brooke, the son of Richard Brooke, was a barrister and was of the Inner Temple, 1595, Bencher, 1607, and Reader, 1611. He was also a member of Parliament from 1604 to 1611. This Thomas Brooke married Susan, daughter of Sir Thomas Forster, Justice of the common Pleas 1607-1612, and the sister of Sir Robert Forster, Chief-Justice of the King's Bench. Of this marriage was

Taney's autobiography and to the "Memoir of Roger B. Taney" by Samuel Tyler.

² The arms of the Brooke family are—chequy or and az., on a bend gu. a lion passant, of the first.

Crest: a demi lion rampant or, erased gu. Maryland Historical Society Magazine, vol. I, No. 1.

³ The Brooke Family. Balch, p. 2.

⁴ Memoir of Roger B. Taney, Tyler 26.

born, June 3d, 1602, Robert Brooke, the first of the family to come to America. On May 11th, 1635, Robert Brooke married, as his second wife, Mary, the daughter of Roger Mainwaring, who subsequently became Bishop of St. David's and came into conflict with Parliament through his over-zealous advocacy of the royal prerogative. Of this marriage was born Roger Brooke in 1637 at Brecknock College in Wales.

Robert Brooke arrived in Maryland from England in 1650 with his wife, ten children and twenty-eight servants "all transported at his own cost and charge," and settled in St. Mary's County on the Patuxent. He was a man of intelligence and influence among his contemporaries, having been appointed by Lord Baltimore Commander of Charles County in 1650. When Maryland was reduced, in 1652, by the Parliamentary Commissioners, he was placed at the head of the provisional council instituted by them. Roger Brooke who came to Maryland at the age of thirteen with his parents, was a Justice of the County from 1674 to 1684, and was of the Quorum from 1679 to 1684.

His grandson, Roger, owned a large landed estate on Battle Creek directly opposite the estate of the Taney's.

Of the paternal ancestors of Taney we have little knowledge except that they were among the early settlers of Maryland, having owned and lived on their estate there for many generations before the

birth of the subject of this essay. Both the Taney's and Brookes were Roman Catholics at least as far back as the second generation before Roger Brooke.

Taney's father, owing to the laws then in force forbidding Roman Catholics teaching in the province, was sent abroad and educated at the English Jesuits' College at St. Omer's. On completing his education he returned to America, took possession of his estate, his father having died, and in 1770 married Monica, the daughter of his neighbor Roger Brooke.

Taney says of his mother:

For the reasons I have stated (the laws against Roman Catholic teachers) my mother's education, as far as mere matter of human learning was concerned, was a very limited one. But her judgment was sound, and she had knowledge and qualities far higher and better than mere human learning can give. She was pious, gentle, and affectionate, retiring and domestic in her tastes. I never in my life heard her say an angry or unkind word to any of her children or servants, nor speak ill of any one. If any of the plantation servants (slaves) committed faults, and were about to be punished, they came to her to intercede for them; and she never failed to use her influence in their behalf, nor did she ever hear of a case of distress within her reach, that she did not endeavor to relieve it. I remember and feel the effect of her teaching to this hour.

There was no school save one within ten miles of the Taney estate. To this one, three miles distant, kept in a log cabin by an ignorant old man, the boy Roger was sent at the age of eight, trudging on foot when the weather was good, remaining at home when it was too inclement. The father, though a

great reader, had little taste for teaching and the beginning of Taney's education was not propitious.

The father was, however, very fond of outdoor life, and early initiated Roger into the sports of riding, swimming, sailing, hunting and skating, which, owing to the weakness of Roger's physique, probably stood him in better stead than would a stricter mental discipline.

When Taney had mastered all that his teacher could give him, which was reading, writing and arithmetic, to the rule of three, he was sent with his brother to a school kept by Mr. Hunter ten miles distant from the Taney home. Hunter, however, becoming insane, the school was closed a few months after Taney entered. The next educational venture was hardly more successful. Taney's father having decided to give Roger a classical education in preparation for a profession, engaged a private tutor, an accomplished scholar, who died, however, a year later. Another tutor, who proved not to be very learned in the classics, remained only a year. The next, David English, was a graduate of Princeton and an accomplished scholar. A great affection sprang up between Taney and English and when Taney was Chief-Justice, English used to sit in the Court day after day. On these occasions Taney never failed when possible, to converse with the then old man. After a year with young Taney, English advised that he be sent to college and, acting on this advice, he went in 1792, when little more than fifteen

years of age, to Dickinson College, at Carlisle, Pennsylvania. At Dickinson the future Chief-Justice commended himself to both professors and students. Doctor Nisbet, the President, cheerfully acted as his guardian as well as his teacher. He boarded after the first six months with James McCormick, the professor of Mathematics, who, with his wife, were as parents to the boy. Mr. and Mrs. Nisbet also showed him great kindness and he spent many pleasant evenings at their home where they gave him good advice, tactfully disguised by the husband, and rendered unintelligible by the broad Scotch accent of the wife. Doctor Nisbet was a true teacher. Taney has written of him:

His object was to teach the pupil to think, to reason, to form an opinion, and not to depend merely upon memory. He undoubtedly succeeded in fastening our attention upon the subject on which he was lecturing and induced us to think upon it and discuss it and form opinions for ourselves.

As the Doctor taught Logic, Ethics, Metaphysics and Criticism, he must have been a rare teacher to have done this for a boy of fifteen. He was held in great respect by the boys notwithstanding the fact that in politics he was decidedly Royalist and did not scruple in his lectures on Ethics to these young Republicans to express the opinion, heresy in their eyes, that there was no stability in the Republic their fathers had just set up. Taney says if these sentiments had been voiced by another the class would have openly rebelled.

That Taney should have remembered and drawn sixty-two years later, so clear a picture of the Doctor and his methods shows how great was the influence his teaching and personality had on his student's mind in its formative period. Perhaps from the old Doctor may be traced in large measure the independent judgment and calm logic of so many of Taney's opinions; and in the picture of the venerable Chief-Justice who, unafraid amid the turmoil of passion and of incipient war, delivers the republican opinion that neither President nor King can suspend the writ of *habeas corpus*, we see an inverted picture of the old Doctor propounding his equally unpopular anti-republican ideas.

Of the three other professors in the College Charles Huston, subsequently of the Supreme Court of Pennsylvania, and at that time studying law, who taught Latin and Greek, seems to have had the most influence on young Taney.

Taney was greatly blessed in being simply a healthy-minded college boy with a proper sense of proportion. There are no stories of wonderful prowess in sports, nor is it recorded of him that he could construe Virgil at some impossible age, or that he dazzled his instructors with premature flashes of genius. He studied faithfully, joined in the athletic sports of his comrades, and found time also to do a good deal of reading in the college library. That he had an alert mind and used it is shown by the fact that, notwithstanding his poor preparation,

he was able to enter college at fifteen years of age and to graduate three years later.

His standing and popularity among his fellow students is evidenced by the fact that he was elected by them Valedictorian of his class on graduation.

In the fall of 1795 having graduated with the degree of Bachelor of Arts he returned home, walking from Carlisle to Baltimore, a distance of eighty-five miles. That winter he spent at home enjoying the amusements of country life, principally fox hunting. He was an ardent follower of this gentleman's sport, and though not robust of frame would follow the hounds through a long day's chase. He did not, however, participate in the game of cards for small stakes with which the day usually ended, and the egg-nog with which the day began he eschewed because it gave him a headache.

Taney's was not the nature out of which the contented fox hunting squire is made, and by the end of the winter he became impatient to begin the study of law for which profession his father destined him and which he himself preferred. Accordingly in 1796 he journeyed to Annapolis to begin his studies. The General Court sat there twice a year, and from the character of the court and eminence of the members of the bar who attended it, Annapolis was considered at that time the place of all others in Maryland for the student of law.

He entered the office of Jeremiah T. Chase, a judge of the General Court.

The sessions of the Court, as they drew the most distinguished lawyers of the state to Annapolis, greatly stirred young Taney's ambition. He refused all invitations to participate in the social life of the place, and associated only with his fellow-students. He devoted himself closely, too closely as he afterward admitted, to the study of law, for weeks together he would study twelve hours in the twenty-four.

Taney says that his preceptor did not encourage moot courts, thinking the discussions were apt to give the students the habit of speaking upon questions they did not understand or of which they had but an imperfect or superficial knowledge. He did however advise him to attend the courts and make reports of the cases heard. Taney did this and was convinced by the failure of such reports to bring out the points involved that his preceptor must have been right as to moot courts. This, not on the principle that since he was wrong in the second instance the chances were against his being also wrong in the first, but on the ground that the immaturity of the student which led to the failure in the one case would have made for failure in the other. The method of study then in vogue being what it was, Taney probably lost nothing from a lack of moot courts. It was his good fortune that at the period of his introduction to the profession of law the bar of Maryland was adorned by some of the most eminent names in our legal history, and the ambition of

the young student was fired by contact with distinguished exemplars of legal learning and forensic eloquence. There was Luther Martin, the profound lawyer, who defended Aaron Burr, William Pinkney, the silver-tongued Beau Brummell of the law of whom it was said by Story that the fire of his eloquence overrode conviction, and of whom Taney himself says that so great was the power of his periods that under their influence the usual simplicity of the language of Chief-Justice Marshall's opinions took on an ornate and embellished style. Philip Barton Key, John Thompson Mason, John Johnson, Arthur Shaaf and James Winchester were also among the great lawyers that Taney at this time was privileged to hear and study.

After three years of close application he was admitted to the bar in 1799. At the outset of his career at the bar one great difficulty beset him,—an unreasoning timidity, a kind of chronic stage fright.

He had suffered greatly from it in his public appearances at college, and although he had striven earnestly to overcome it by constant practice in debating both in college and during his law studies, yet on his first appearance as counsel in an assault and battery case in the Mayor's Court his hand so shook that he could take no notes and when he arose to speak he was obliged to press his limbs against the table to keep steady on his feet. This "morbid sensibility," as he terms it, pursued him throughout his career, and he states that in the early years of his practice he

is not sure he would not have abandoned the law if he had had means sufficient to live without a profession. This weakness was due primarily to his delicate health, and to this he ascribes it, but it was probably accentuated by the fact of his early contact with great orators. He was ambitious to be like them and the very force of this desire, and his ability to appreciate their greatness caused him to fear in each effort that he was falling short of the measure he had set himself. He met this weakness as he met a more dangerous weakness, a hot temper, by fighting it. He made it a rule to speak on every occasion, both professional and political, that offered. That he did overcome it, in so far as it affected his force as a speaker, is shown by the fact that he met in the legal forum on equal terms the greatest advocates of his or any other day. An eminent lawyer of Baltimore thus describes him in after years:

His arguments and his manner made a deep impression on me. He sought to aid from rules of rhetoric, none from the supposed graces of elocution. I do not remember to have heard him, at any time, make a single quotation from the poets. Yet his language was always chaste and classical, and his eloquence undoubtedly was great, sometimes impetuous and overwhelming. He spoke when excited, from the feelings of his heart, and as his heart was right, he spoke with prodigious effect.

Taney's father whose many terms in the Maryland House of Delegates had somewhat enamored him of political life, was anxious that his son should enter this field and to this end Taney took an active part in

the work of the House and always considered the experience gained in his first session of much advantage in his after life. He acquired greater ease in public speaking, and was brought into close association with the most distinguished men of the state in debate and in the conduct of public affairs. He mingled in the gay society of the capital, though he confessed to be more at home in the debates in the House than in the repartee of the drawing room, where his extreme near-sightedness rendered him awkward and sensitive.

Taney's defeat at the next election for the House of Delegates made necessary a return to the practice of law, and the recent death of the two leading members of the bar of Frederick, induced him to select that place for his efforts.

The picture we have of Taney at this time is of a young man of delicate health but strong mind; ambitious in a profession the high places of which depended in large measure on oratorical ability; but who was timid to the verge of morbidity; bashful and awkward in a society in which grace and social ease were peculiarly accounted for righteousness; one who preferred the light of the moon to the flame of the midnight lamp. Add to this a fiery temper requiring to be controlled if success was to be achieved and there would appear to be little promise of success for such a nature in the profession he had chosen.

Given a strong enough will to succeed, nothing so

surely augurs success as an apparent ill-adaptation for it. If it is true that "nothing succeeds like success" it is equally true that nothing succeeds like failure. The sting of defeat at Bull Run brought the lust of victory that achieved Appomattox; out of Taney's failure in his first forensic legal effort was born a determination to master this weakness, that resulted in making him a foeman worthy of the steel of Wirt and Webster.

The same resolute will that overcame the trembling of the timid young collegian in his first public forensic effort, enabled him—not only to still his trembling limbs before large audiences—but to fix their eyes upon his face and their thoughts upon his speech. It served to make of the lad who liked best to wander by the brook, the student who became known to his fellows as one who could not be enticed from his books. It enabled him, when he found that his antagonists in the courts were luring him into intemperate language, making capital of his uncurbed temper, to subject it to such control that the fires only seethed beneath the surface, giving that impression of reserve force which is the strongest weapon of the orator.

He began the practice of his profession in 1801, in Frederick, then a place of three thousand inhabitants and the county seat of Frederick county which then embraced what are now Montgomery, Washington and Alleghany Counties. His biographer says of him:

From his first appearance at Frederick Mr. Taney was a diligent student. Law was his chief study; but he devoted much time to the study of history and of letters. He not only studied thoughts, but he studied words and style with uncommon care. He cultivated a simple and severe taste.

In 1803 Taney again essayed politics, becoming a candidate on the Federal ticket for the House of Delegates. He was defeated.

On January 7, 1806, he married Phœbe Charlton Key, whose father owned a large estate in the County, and whose brother, Francis Scott Key, author of the Star Spangled Banner, had been a fellow student and friend of Taney's at Annapolis. This marriage was in every way a happy one, Miss Key being a woman of beauty and accomplishments, and of womanly grace.

Without any signal or phenomenal successes Taney continued to rise in his profession, and in 1811 was engaged as counsel for General Wilkinson, then Commander-in-Chief of the United States Army, who was suspected of having been an accomplice of Aaron Burr in his alleged treasonable undertaking. Notwithstanding the intense unpopularity of Wilkinson, and the fact that he was prosecuted by the ablest of counsel, he was acquitted. Taney had at first shared in the popular suspicion that Wilkinson had been treacherous to Burr. When he became convinced that his suspicions were unjust, even though the injustice had proceeded no farther than his thought, he made the *amende honorable*, refusing to

accept of Wilkinson any fee for his services in defending him.

Taney being a Federalist was with the rest of his party bitterly opposed to the declaration of war in 1812, but war having been declared he supported the Government in the prosecution of it. This estranged him from a portion of his party in Maryland and he became the leader of the other wing. In consequence of this split in his party he was defeated in the next election for a seat in the House of Representatives of the United States. Not long after, however, in 1816, he was elected by a re-united party to the state Senate where his growing reputation was enhanced.

In 1819, he acted as principal counsel in the defense of a Mr. Gruber, a Methodist minister from Pennsylvania, who had been indicted for inciting slaves to insurrection. The act charged was that Gruber had preached a sermon before a congregation, of which four hundred were negroes, in which he said among other things:

Are there not slaves in our country? Do not sweat and blood and tears say there are? The voice of my brother crieth blood. Is it not a reproach to a man to hold articles of liberty and independence in one hand and a bloody whip in the other, while a negro stands and trembles before him with his back cut and bleeding?

Taney's speech to the jury affords a good illustration of his calm eloquence, "his apostolic simplicity of diction;" he appeals without passion to the high

sense of the justice of the people. He understands the paradox of their passion for liberty, and appeals to a jury of slaveholders to recognize the liberty of Gruber to preach liberty to those to whom they denied liberty.

This address also throws an interesting side light on Taney's independence of thought, his ability to see beyond his environment. Born and reared in a society of whose economic structure slavery was the keystone, he thus speaks to a jury of slave holders:

There is no law which forbids us to speak of slavery as we think of it. Any man has the right to publish his opinion on that subject whenever he pleases. Mr. Gruber did quote the language of our great act of national independence, and insisted on the principles contained in that venerated instrument. He did rebuke masters, who, in the exercise of power, are deaf to the calls of humanity, and he warned them of the evils they might bring upon themselves. He did speak with abhorrence of those reptiles who live by trading in human flesh, and enrich themselves by tearing the husband from the wife, the infant from the bosom of the mother, and this, I am instructed, was the head and front of his offending. Shall I content myself with saying he had a right to say this? that there is no law to punish him? So far is he from being the object of punishment in any form of proceeding, that we are prepared to maintain the same principles, and to use if necessary the same language here, in the temple of justice and in the presence of those who are the ministers of the law. A hard necessity indeed compels us to endure the evil of slavery for a time. It was imposed upon us by another nation while we were yet in a state of colonial vassalage. It cannot be easily or suddenly removed. Yet while it continues, it is a blot on our national character, and every real lover of freedom confidently hopes that it will effectually, though it must be gradually, wiped

away, and earnestly looks for the means by which this necessary object may be best attained.

Gruber was found "not guilty."

Thus did Taney acquit before a jury of the vicinage the man who came among them uttering incendiary words in the presence of slaves who in most instances had their masters and mistresses at their mercy in case of a servile insurrection.

Mr. Taney's kindness to younger members of the bar was proverbial, and many stories are related of help given to his juniors in the preparation of their cases, and of his refusal to take advantage of the inexperience of his younger opponents even in the trial of a cause.

As a practitioner it might well be said of him as it was said of the late Justice Holker, "that while zealous for his clients, he was always just toward his opponents. He employed no art. His armor was his honest thought and simple truth his utmost skill."

The bar of Baltimore having suffered the loss of those great lawyers, Luther Martin and William Pinkney, Taney reluctantly decided in 1823 to leave Frederick and take up his residence in Baltimore. Here he soon rose to be the leader of the bar, not only in Baltimore, but in the State of Maryland, though his companion and warm friend, William Wirt, being Attorney-General of the United States, had a then greater national reputation.

Mr. Taney seems never to have had any political ambitions; his early essays in politics were made to

gratify his father's wishes and as a means to professional success. He was ambitious to succeed in his chosen profession but he had no aspiration for merely political honors not in the line of that profession.

The one position he seems to have aspired to was that of Attorney-General of Maryland and to this position he was appointed, on the unanimous recommendation of the Baltimore bar, by Governor Kent, a warm adherent of the political party opposed to Taney. As Attorney-General of Maryland Taney was unqualifiedly successful. Since his admission to the bar a diligent student he now eschewed society entirely and devoted all his energies to his professional duties.

Taney had now reached the height of his ambition, eminence in the practice of his profession in his native state, but as we look back on his life we see that in reality he had only laid the foundation of that wider career of usefulness that was awaiting him. The time had now come when he was to feel the call to this career.

General Jackson was inaugurated President in 1829 and, though a Republican, was desirous of having the Federalist party represented in his cabinet, but it must be by a Federalist who had not been what he regarded a traitor during the War of 1812.

Such a Federalist was Taney. He had opposed the War of 1812, but when once war was declared he had given the Government his support while the New England Federalists were holding the Hartford

Convention and planning secession. Taney's record in this particular, together with his great legal attainments, caused Jackson to tender to him the position of Attorney-General of the United States which, reluctantly, he accepted. He was appointed in 1831. The history of Attorney-General Taney belongs rather to political history than to this sketch. Suffice it to say that he performed the duties of his office with great distinction and with satisfaction to the administration. Although apparently as far apart as the poles, this soldier and this student became warm personal friends and Taney was the most trusted adviser of the President in his struggles with Congress.

When Congress in 1832 passed a bill renewing the charter of the Bank of the United States, Taney was the only member of the Cabinet who advised the President to veto the bill, and it was done. The latter assisted the President to write the veto message.⁵

⁵ The government directors of the Bank had officially reported that the Bank had "been actively engaged in attempting to influence the elections of the public officers by means of its money, and that, in violation of its charter, it had by a formal resolution placed its funds at the disposition of its president to be employed in sustaining the political power of the Bank." Message of President Jackson to Congress, 1833. Quoted in *Epochs of American History*. Woodrow Wilson, 82. "Is there no danger (ran the message) to our liberty and independence in a bank that in its nature has so little to bind it to our country? The president of the bank has told us that most of the State banks exist by its forbearance. Should its influence become centred as it may under the operation of such an act as this, in the hands of a self-elected directory, whose interests are identified with those of the foreign stockholders, will there not be cause to tremble

In this message Taney voiced his conviction as to the danger of such a monopoly as the bank to the political well-being of the people, a conviction not then entertained by the greatest leaders of political thought, as later in the Charles River Bridge Case he pointed out the dangers of commercial monopolies to the economic progress of the country. The message further counseled what we are only just now beginning to demand that if the monopoly should be granted the grantee should pay a compensation therefor proportionate to the value of the franchise. Taney's views as to the Bank though opposed by such leaders of political thought as Calhoun, Webster and Clay were largely shared in by the people. When the two parties "went to the country" in the elections of 1832 to obtain its verdict on the issue of the re-charter of the Bank that verdict was given in favor of the administration.

Taney had for some time been convinced that it would be unwise for the government deposits to remain in the Bank until the close of its corporate existence, and as the responsibility for the safety of these funds, in his opinion, was on the executive and not on the legislative department of the government, he now advised the president to withdraw the gov-

for the purity of our elections in peace, and for the independence of our country in war?"

"If it were wise," it continued, "to establish such a monopoly the government ought to receive a fair equivalent. The value of the monopoly was estimated as at least \$17,000,000 which under the terms of the bill it was proposed to barter for \$3,000,000."

ernment deposits.⁶ The funds, he argued, must be removed sooner or later since there was now no chance that the Bank would ever be re-chartered, and, in view of the Bank's determined hostility to the government it was wisest to remove them promptly. A private letter written by him to the President at this time⁷ demonstrates that Taney was fully alive to the

⁶ Two unfortunate incidents for the bank—the protesting a draft on the United States treasury drawn through the bank by the French treasury, and the action of the president of the bank in advising against the immediate payment of a large portion of the 3 per cent debt held largely by foreigners—served still more to convince Jackson and Taney that the bank was unsafe.

Jackson at this time remarked: "I tell you, sir, she's broke. Mr. Biddle is a proud man and he never would have come to Washington to ask me for a postponement if the bank had the money. Never, sir, the bank's broke, and Biddle knows it."

⁷ In my official communications I have already expressed my conviction that the deposits ought to be withdrawn by order of the Executive, provided a safe and convenient arrangement can be made with the State banks for the collection and distribution of the revenue. And I have advised that the step should be taken before the meeting of Congress because it is desirable that the members should be among their constituents when the measure is announced, and should bring with them, when they come here, the feelings and sentiments of the people. I rely, at all times, with confidence on the intelligence and virtue of the people of the United States; and believing it right to remove the deposits I think they will sustain the decision. Entertaining these opinions, I am prepared to hazard much in order to save the people of this country from the shackles which a combined moneyed aristocracy is seeking to fasten upon them. But although it is my duty frankly to state to you the opinion I hold on this subject, yet I do not desire to press this measure upon you, . . . after a life of so many hazards in the public service and after achieving so much for the cause of freedom, in the field and the Cabinet, I have doubted whether your friends or the country have a right to ask you to bear the brunt of such a conflict as the removal of the deposits

bitter opposition that this *coup de grâce* upon the Bank would arouse on the part of the powerful friends of the institution, and the conflict it would precipitate. It also shows his readiness to resign his place of safety on the staff and accept a position on the firing line if in such position he could render more aid in what he considered would be a decisive battle between the people and the "moneyed power."

Taney's high patriotism and spirit of self-sacrifice is sufficiently shown in thus signifying his willingness to exchange the position of Attorney-General for that of Secretary of the Treasury. He was resigning an office for which his whole previous career had been an unconscious, but none the less real, preparation, for a position for which he avows his unfitness, and for the duties of which he could certainly have had no predilection, and that too with the conviction that the first act he would be called upon to perform in his new office would bring together in antagonism to him such powerful leaders as Calhoun and Webster, Clay, McDuffie, Adams and Binney.

under present circumstances is likely to produce . . . if you should finally make up your mind to adopt this measure, and should, as you intimated, find it necessary to call for my services, to aid in carrying it into execution, they will be promptly and willingly rendered.

. . . I should greatly regret the necessity for any change in your Cabinet. You will do me the justice to believe that I have no desire for the station you suggested (Secretary of the Treasury). For as I have already said to you, I do not think myself qualified for even its temporary occupation. But I shall not shrink from the responsibility, if, in your judgment, the public exigency should require me to undertake it. *Memoir, Tyler, 195.*

The sacrifice was accepted by Jackson and on the refusal of Mr. Duane, the Secretary of the Treasury, to withdraw the government funds from the bank, he was removed and Taney appointed in his stead.

He entered upon his new duties on September 24, 1833, and on the 26th gave the order for the removal of the deposits;⁸ and the storm broke. The action of the Secretary was denounced as an unconstitutional exercise of the power and prerogative of Congress, by Calhoun, Webster and especially by Clay who was largely responsible for the final issue,⁹ and a resolution of censure was even passed on Jackson by the Senate, March 28th, 1834,¹⁰ but Jackson and Taney, secure in the rectitude of their intentions, in the legality of their action and in the importance of the issue stood firm. In regard to the merits of the question of re-chartering the bank blame and praise have alike been bestowed on Jackson and his Secretary. Dewey in his *Financial History of the United States*, says:¹¹

The political methods used by Clay (the champion of the bank) gave color to the charge that the bank was in truth a monster; President Biddle's memorial in 1832 asking for a renewal was ill-worded; the tactics of the bank to secure a favorable

⁸ It is usual to speak of the withdrawal of the deposits. In fact no deposits were withdrawn; the order was that no further deposits of government funds should be made. The funds then on deposit were drawn on in the usual course of business.

⁹ Dewey's *Financial History of the United States*. 209.

¹⁰ *History of the People of the United States*. McMaster, vol. VI, 206.

¹¹ p. 208.

consideration were calculated to arouse suspicion in the mind of a man like Jackson, who always prided himself on standing up for the rights of the plain people. Suspicion of the motives of the bank was certainly justified when it became known between January 1831 and May 1832 the loans of the bank had been extended from \$42,000,000 to \$70,000,000.

On June 23d, 1834, Jackson sent to the Senate the nomination of Taney as Secretary of the Treasury. The majority of this body being opposed to the administration and rejoicing in the opportunity to discipline the President and his trusted adviser, the next day rejected the nomination. This was the first time in the history of our Government that the nomination of a cabinet officer was rejected by the Senate. The following day Taney resigned.¹²

Mr. Taney's reception in Baltimore on his return to that city from Washington was of a most flattering character. Public dinners were tendered him and resolutions approving his course were adopted in many parts of the country. The powerful inter-

¹² Jackson in a letter to Taney acknowledging his resignation says: "You generously abandoned the studies and avocations to which your life had been devoted, and encountered the responsibility of carrying into execution those great measures which the public interest and the will of the people alike demanded at our hands. For the prompt and disinterested aid thus afforded me, at the risk of personal sacrifices which were then probable and which have now been realized, I feel that I owe you a debt of gratitude and regard which I have not the power to discharge. But, my dear sir, you have all along found support in a consciousness of right, and you already have a sure promise of reward in the approbation and applause which an intelligent and honest people always render to distinguished merit." Quoted in Memoir, Tyler, 222.

ests he had opposed pursued him however, and Mr. Webster in a public speech at Salem, spoke of him as the "pliant instrument" of the President. We have seen from Taney's letter to Jackson, quoted in the notes, how little merited was this charge; that whatever of praise or blame is to be awarded Taney for his part in this transaction must be that of a principal not that of an agent.

Taney took occasion at a public dinner given to him to catch Webster on the hip. He said:

Neither my habits nor my principles lead me to bandy terms of reproach with Mr. Webster or any one else. But it is well known that he has found the bank a profitable client, and I submit to the public whether the facts I have stated do not furnish ground for believing that he has become its "pliant instrument" and is prepared on all occasions to do its bidding, whenever and wherever it may choose to require him. In the situation in which he has placed himself before the public it would far better become him to vindicate himself from imputations to which he stands justly liable, than to assail others.

In January, 1835, Justice Duvall having resigned from the Supreme Court of the United States, President Jackson nominated Taney for the vacancy. Chief-Justice Marshall, though he was opposed to the policy of Jackson, had so high an opinion of Taney that while the nomination was pending he wrote to Senator Leigh, of Virginia,¹⁸ "If you have not made up your mind on the nomination of Mr. Taney, I have received some information in his favor

¹⁸ Quoted in Memoir, Tyler, 240.

which I would wish to communicate." The Senate, at the very end of the session voted to indefinitely postpone. Perhaps had the leaders of that body foreseen that the result of their action would be to raise Taney to a higher honor than the one proposed they would have acted differently. However that may be, less than a year later, in December of the same year, Chief-Justice Marshall having died the preceding summer, Taney was nominated for the position thus left vacant, and the political complexion of the Senate being different, he was confirmed, notwithstanding the violent opposition of Webster and Clay, on the 15th of March, 1836.

Taney brought to the service of his country as chief of the most powerful branch of the Government a profound knowledge of the law, gained not only from a study of it as a science, but from a large and varied practice of it in all its branches, common law, equity jurisprudence and maritime law. In addition to his knowledge of substantive law he was highly skilled in the law on its procedural side both from special study and from his general practice in courts of original jurisdiction. His service in the cabinet had given him experience of the workings, the needs and the dangers of the Government and governmental machinery, which, in the then embryonic state of our Constitutional law, with new questions constantly arising as to the legitimate functions of the Federal and State Governments, was a valuable asset. These accomplishments were built upon a

character proof against the poisoned arrows of his bitterest enemies, and illumined by a mind singularly clear, logical and analytical.

It is impossible within the limits of this essay to discuss all of the important decisions in which Taney took part. The writer will therefore confine himself to those involving important constitutional and public questions.

It was prophetic that the first opinion delivered by Taney involved the slavery question.¹⁴ A negro woman, a slave, was taken to France by her mistress for a temporary residence, but being desirous to return to the United States she was sent back by her mistress in the ship *Garonne* and landed in New Orleans where she was subsequently held as a slave. The *Garonne* was libelled at New Orleans under the Act of 1818 prohibiting the importation of slaves into the United States. The Chief-Justice speaking for the whole court held that the provisions of the act did not apply. The intent of the act was to put an end to the slave trade, and to prevent the introduction of slaves from foreign countries. "In the case before the court," said the Chief-Justice, "although the girl had been staying for a time in France, in the service of her mistress, yet in construction of law she continued an inhabitant of Louisiana and her return home in the manner stated in the record, was not an importation of a slave into the United States."

¹⁴ United States vs. The *Garonne*, 11 Peters' Reports, 73.

In 1840 a similar Act came before the court for construction.¹⁵ One Morris was indicted under an Act prohibiting the carrying on of the slave trade. The defendant was captain of the *Butterfly* which had sailed from Havana to the coast of Africa, having on board the usual equipment of vessels engaged in the transportation of slaves from Africa. She was captured before she reached the African coast and before any slaves were taken on board. Taney states the question to be "whether a vessel on her outward voyage to the coast of Africa for the purpose of taking on board a cargo of slaves is "employed or made use of" (the words of the act) in the transportation or carrying of slaves from one place to another, before any slaves are received on board; and in a short opinion comes to the conclusion that "not only in the ordinary meaning of the word, but in the sense in which that word is used in other acts of Congress, to be 'employed' in anything means not only the act of doing it, but also to be engaged to do it; to be under contract or orders to do it." He brushes aside the technicalities of the defendant's argument and, looking to the intent of the act, to abolish the slave trade, holds that in sailing to the coast of Africa, equipped [as she was], the vessel was engaged as a slaver.

These two cases are typical of Taney's attitude toward the question of slavery and the Constitution. As a judge pledged to administer the law, he con-

¹⁵ United States vs. Morris, 14 Peters' Reports, 464.

ceived that his duty was not to seek technicalities either to uphold, extend, restrict or prohibit slavery, but recognizing its legality and limitations under the Constitution his duty was to find in the intention of the makers of that instrument, and of Congress when they acted lawfully under it, the law of the land, and to declare that law without regard to the political aspects of the question.

As a necessary preliminary to a proper understanding of Taney's influence on Federal jurisprudence it must here be said that his great predecessor, Marshall, in his later years on the bench had shown a growing, and to many an alarming, tendency toward Nationalization. Marshall, the first great builder of our national jurisprudence, was given the constitutional plan of the new edifice, and proceeded to erect a stately structure. As it grew under his master-hand the desire to build strongly overcame his sense of proportion, and he departed more and more from the original plan, using the stones intended for the wings to buttress more firmly the central building, until the whole, however wonderful it was, differed greatly from that planned by the architects. It was well that Marshall was succeeded as chief builder by another master builder who set himself patriotically to work to bring the structure he was commissioned to build into greater harmony with the original plan. The time for a change was opportune. If the structure was ever to be brought into harmony with the ideas of those who originally planned it, it was best that

it be done while it was still possible to remodel it without actually tearing it down.¹⁶

No judge who ever sat on the Supreme Court bench discriminated more clearly in determining the proper repository of power under the Constitution;

¹⁶ McMaster says, History of the People of the United States, vol. V, 412. "Dominated by the master mind of Marshall the court no longer approached constitutional questions with the old-time caution" and on p. 109 "The doctrine of 'the people' formulated by Marshall in his opinion in *McCulloch vs. Maryland* and his most distinctive contribution to the theory of American constitutional law . . . yet no theory could have slighter historical foundation." That deep student of Constitutional law, the late Professor James B. Thayer, says of Marshall: "He determined to give full effect to all the affirmative contributions of power that went to make up a great and efficient national government; and fully, also, to enforce the national restraint and prohibition upon the States. In both cases he included not only the powers expressed in the constitution, but those also which should be found, as time unfolded, to be fairly and clearly implied in the objects for which the federal government was established. JOHN MARSHALL, 58. "Ever since 1815," says McDonald, writing of the Court, "the trend of decision in the Supreme Court had been strongly in favor of loose construction and a broad extension of the federal power and a corresponding restriction of the sphere of the States. Such opinions as those in *McCulloch vs. Maryland* (1819), *Dartmouth College* (1819), *Gibbons vs. Ogden* (1824), *Brown vs. Maryland* (1827), and *Insurance Co. vs. Canter* (1828) had given the federal authority a scope such as even the early Federalists had not claimed." The American Nation. Edited by Alfred Bushnell Hart. "Jacksonian Democracy" p. 249. And again, "It was the development of the doctrine of implied powers . . . stated with consummate clearness by Marshall in a long series of decisions (that) had given the federal authority a scope far beyond anything that could have been dreamed of by those who saw the national government inaugurated . . . If progress were to continue in this direction the authority of the nation would soon be everywhere supreme and the 'sovereignty of the States' would become ere long only a memory and a name," *ibid.* 107-8.

and his efforts in this direction have impressed themselves indelibly on the jurisprudence of the country. It is not difficult to assert a novel jurisdiction when there is no power to deny it, and to elaborate a brilliant argument with "implied power" as the major premise; and such is the American admiration for

"By 1811 the Supreme Court had been Republicanized, but its principles, or practice, became at the same time Federalized, or perhaps Marshallized." *The American Nation.* Edited by Alfred Bushnell Hart, vol. XIII. (Babcock) p. 293. Sparks, *The United States*, part I, p. 398, says: "The formative decisions of Marshall during his thirty-four years on the Supreme Bench maintained constantly the rights of the Federal courts and added to the prerogatives of the Central Government against the States." "Ploughing in fresh ground" (says Magruder; in his life of John Marshall, p. 179, 180); "He could run his furrows in what direction he thought best, and could make them look straight and workmanlike . . . He made Federalist law in nine cases out of ten, and he made it in strong and shapely fashion."

"The Chief-Justice, a man who in grasp of mind and steadiness of purpose had no superior, perhaps no equal, was *bent on enlarging* the powers of Government in the interest of justice and nationality." *History of the United States*, Henry Adams, vol. I, 192.

"Marshall, in his great constitutional decisions, did an incalculable service to the country during the formative period: First in strengthening the National government . . . and third in restricting the powers of the States." *History of the United States*, Elson, p. 490, n.

"Marshall had won a slow certain victory over States' Rights and had thrust powers in the National Government which, if Jefferson were right, must end in completely destroying it." *History of the United States*, Henry Adams, vol. I, 258.

"Marshall found between the lines of the constitution the 'implied powers' without which," etc. John Marshall, an address, by Isaac N. Phillips. This court had at this time a purpose to which "Marshall, with all his modest and simple demeanour, gave courageous direction: that, namely, of riveting the Union on every opportunity into a national government by enlarging the scope of constitutional powers." *History of the United States*. Schouler, vol. III, 196.

boldness and initiative that we are inclined to regard the very assumption of power as the mark of a great man. It is more difficult to criticize the charter of authority dispassionately, to ignore the natural appeal to love of power and to refuse to yield to the supposed exigencies of the case, and to see clearly and act on the limitation of power, the assumption of which, owing to the high position of the one assuming it, will be accepted of all men as legal.

This latter Taney constantly did, not only when the jurisdiction of his court was the issue, but also when the question was as to the power of the government of which he was the judicial head. Like Washington, he was never swayed by the love of power.

Jefferson could never have spoken of Taney as he did of Marshall, as "a thief of jurisdiction," nor could it ever be said of him as it was of Story, that "he absorbed jurisdiction like a sponge." When Taney took his seat on the Bench of the Supreme Court there were three cases of first importance pending. They were: *City of New York vs. Miln*,¹⁷ *Briscoe vs. Bank of the Commonwealth of Kentucky*,¹⁸ and *The Proprietors of the Charles River Bridge vs. the Proprietors of the Warren Bridge*.¹⁹ These cases had been previously argued before the court while Chief-Justice Marshall was still on the bench and he thought the state statute attacked in the

¹⁷ II Peters' Reports, p. 102.

¹⁸ II Peters' Reports, p. 257.

¹⁹ II Peters' Reports, p. 420.

first two cases an unconstitutional attempt by the State to infringe the power of the federal government. The cases were reargued before Taney, and the decision of the court was, in each case, a reversal of the centralizing effect of the line of precedents established by Marshall.

The Mayor of the City of New York vs. Miln involved the question of the constitutionality of an act of the legislature of New York which required the master of every vessel arriving in the port of New York from any foreign port or from any port of any of the states of the United States, other than New York, under certain penalties, to report in writing within twenty-four hours after his arrival, the names, ages, and last legal settlement of every person who was on board the vessel during the voyage; and whether any of the passengers had gone on board any other vessel, or had, during the voyage, been landed at any place with a view to proceed to New York. This act was designed to prevent the state being burdened with an influx of foreigners or persons from other states who might become chargeable as paupers.

It was argued that the statute was in conflict with the Constitutional provisions vesting in Congress the power to regulate commerce; and Gibbons vs. Ogden,²⁰ and Brown vs. Maryland,²¹ in both of which cases Marshall had delivered the opinion of the court

²⁰ 9 Wheaton's Reports, 1.

²¹ 12 Wheaton's Reports, 419.

and held the state statute involved void, were cited. The majority of the court, including Taney, held that the Act did not constitute a regulation of commerce, but was a mere regulation of police and therefore within the power of the state. It was also held that "persons" were not the subjects of commerce.

The case of *Gibbons vs. Ogden* decided that the acts of the legislature of New York granting to certain individuals the exclusive navigation of all the waters within the jurisdiction of that state with boats propelled by steam, for a term of years, was repugnant to the clause of the Constitution authorizing Congress to regulate commerce, so far as the said acts prohibited vessels licensed according to the laws of the United States for carrying on the coasting trade, from navigating said waters by means of steam.

Brown vs. Maryland decided that a statute of Maryland requiring all importers of foreign goods by bale or package, and other persons selling the same by wholesale bale or package, etc., to take out and pay for a license was repugnant, among others, to the same clause.

The court clearly distinguishes the case before them from *Gibbons vs. Ogden*²² and *Brown vs. Maryland*.²³ When it is remembered that Justice Story says that Marshall on the previous hearing of *New York vs. Miln* was of the "deliberate opinion

²² 9 Wheaton's Reports, 1.

²³ 12 Wheaton's Reports, 419.

. . . that the present case fell directly within the principles established in the case of *Gibbons vs. Ogden* . . . and *Brown vs. The State of Maryland*" the extent to which Marshall was prepared to extend the doctrine of those cases, a doctrine that had already, as agreed by late historians, given the federal authority a scope such as even the early Federalists had not claimed, is apparent.

But in *New York vs. Miln* the court not only distinguishes *Gibbons vs. Ogden* and *Brown vs. Maryland* but justifies its decision by quotations from the opinions of Marshall in the former case.²⁴

Justice Story dissents. In his opinion he says:

In this opinion I have the consolation to know that I had the entire concurrence, upon the same grounds, of that great constitutional jurist, the late Mr. Chief-Justice Marshall. Having heard the former arguments his deliberate opinion was, that the act of New York was unconstitutional; and that the present case fell directly within the principles established in the case of *Gibbons vs. Ogden*, and *Brown vs. The State of Maryland*.

Indeed the extensions of the federal power by Marshall are not so much due to the *principles* he announced in deciding the cases that came before him. Many of these principles, announced in cases that had the greatest effect in extending that power, were such as might have been subscribed to by Patrick Henry or Calhoun himself. It was in his *application* of the principle that the work of centralization was carried forward. Hence it was that the court

²⁴ 11 Peters' Reports, 137.

under Taney in this as in many other cases were able to cite Marshall as authority for the principles on which their decisions *denying* federal power were based, when if the case had come before Marshall we would have to conclude, granting Story's representations and conceding to Marshall consistency, that Marshall would have decided in favor of the federal power.

This decision was a decided brake on the wheel of the judicial car that had been so smoothly running on the road toward Nationalization. In the next case decided the brake was applied with a still firmer hand, while in the third the lever was placed in Taney's hand and the car's progress was effectually stopped.

The second case Briscoe vs. Bank involved the construction of a statute of Kentucky establishing a bank "in the name and behalf of the Commonwealth of Kentucky." It was argued against the Constitutionality of the Act that the Constitution prohibited the states from emitting bills of credit.

The opinion of the court was delivered by Justice McLean. He holds the act valid on the ground that the power to incorporate a bank was an incident of sovereignty, that since all powers not given to the general government were reserved to the states, and since this power was not given up, the bills issued not being bills of credit within the meaning of the Constitution, the state might exercise its inherent power. The doctrine established in this case and ever since

maintained was in direct conflict with Marshall's opinion in *Craig vs. Missouri* delivered seven years earlier.

Mr. Justice Story dissented. He reverted to the fact that on the original argument, on the same grounds, a majority of the court including Marshall were of the opinion that the act was unconstitutional, and invokes the voice of the dead chief to "convey its own admonition," and adds:

Mr. Chief-Justice Marshall is not here to speak for himself; and knowing full well the grounds of his opinion, in which I concurred, that this act is unconstitutional; I have felt an earnest desire to vindicate his memory from the imputation of rashness, or want of deep reflection. Had he been living, he would have spoken in the joint names of both of us.

In the *Proprietors of the Charles River Bridge vs. The Proprietors of the Warren Bridge*, Taney delivered his first opinion on a constitutional question.

In 1650 the legislature of Massachusetts granted to the President of Harvard College the "liberty and power" to dispose of the ferry from Charlestown to Boston over the Charles River. The College held the ferry and received the profits therefrom until 1785. In 1785 the legislature incorporated a company, "The Proprietors of the Charles River Bridge," to erect a bridge "in the place where the ferry is now kept;" certain tolls were granted to the company, the charter was limited to forty years, and the company were to pay until the expiration of the term two hundred pounds annually to the college. At the ex-

piration of the forty years the bridge was to be the property of the state; "saving (as the law expressed it) to the said college or university, a reasonable annual compensation, for the annual income of the ferry, which they might have received had not the said bridge been erected." The bridge was built and was opened for traffic in 1786. In 1792 the charter was extended to seventy years from the opening of the bridge.

In 1828 the legislature incorporated another company by the name of "The Proprietors of the Warren Bridge" to erect another bridge over the same river, sixteen rods on the Charlestown side from the bridge of the plaintiffs and about fifty rods from the plaintiff's bridge on the Boston side of the river. This second company was given power to take tolls on its bridge which was to become free as soon as the expenses of the proprietors in building and supporting it should be re-imbursed, this period in any event not to exceed six years from the time the company commenced receiving toll. The bridge had in fact become free when the final hearing of the cause was had.

The Proprietors of the Charles River Bridge filed a bill in the state court of Massachusetts for an injunction to prevent the erection of the Warren Bridge, and for general relief, charging that the act for the erection of the Warren Bridge impaired the obligation of the contract between the state and the proprietors of the Charles River Bridge. The state

court dismissed the bill by an equally divided court and the plaintiffs took a writ of error to the Supreme Court of the United States. In this court the plaintiffs in error rested their case mainly on two grounds: 1st that by virtue of the grant of 1650, Harvard College was entitled, in perpetuity, to the right of keeping a ferry between Charlestown and Boston; that this right was exclusive, and that the legislature could not establish another ferry on the same line of travel without infringing the rights of the college; and that these rights, upon the erection of the bridge in the place of the ferry under the charter of 1785, were transferred to the Proprietors of the Charles River Bridge. 2d. That independently of the ferry right, the acts of the legislature of 1785 and 1792 *implied* that the legislature would not authorize another bridge, and especially a free one, by the side of this, in the same line of travel whereby the franchise of the Proprietors of the Charles River Bridge would be rendered of no value; and that the grant of the ferry to the college, and of the charter to the proprietors of the bridge were both contracts made by the state and that the law authorizing the erection of the Warren Bridge impaired the obligation of one or both of these contracts.

It is significant that this case should have been presented to the court at the culmination of Marshall's career. The plaintiff's case was the logical outcome of Marshall's series of decisions on implied powers.

He had applied this doctrine of implied powers to the construction of the constitution, the plaintiff now asked that it be applied to an act of the legislature and it is not strange that Marshall was prepared thus to extend this doctrine.

If in a written grant of powers such as the Constitution, containing a provision that the powers not granted were reserved to the states or the people, it were proper to hold that powers not expressly granted might be implied, what more logical than the conclusion that in a grant of power (franchise), *without* the qualifying restriction that the franchise might be withdrawn, there might be implied anything necessary to render the franchise of continued value. The dissenting opinion of Justice Story embodying as it is believed to do the views of Marshall,²⁵ shows how far the court under Marshall's leadership was prepared to extend the Implication theory.

Taney in a most trenchant opinion, and one which has received the general assent of the profession, having first pointed out that the questions raised as to the power of the several states in relation to the corporations they had chartered were pregnant with important consequences, says, "They must show that the state had entered into a contract with them, or those under whom they claim, not to establish a free bridge at the place where the Warren bridge is erected."

²⁵ Life and Letters of Joseph Story, vol. II, 271.

He then shows that the *exclusive* right in the original grant to Harvard College to maintain a ferry could not be implied in the grant to another corporation of the right to build a bridge, the two franchises being different in their nature, and established by different grants. Any rights granted to the college in its franchise had been extinguished with the extinguishment of the franchise, and the franchise had ceased to exist when there remained in existence no one possessed of authority to use it, and keep the ferry.

The ferry then, of necessity, ceased to exist as soon as the bridge was erected; and when the ferry itself was destroyed, how can rights which were incident to it be supposed to survive? The exclusive privileges, if they had such, must follow the fate of the ferry, and can have no legal existence without it,— and if the ferry right had been assigned by the college, in due and legal form, to the proprietors of the bridge, they themselves extinguished that right when they erected the bridge in its place. It is not supposed by any one that the Bridge Company have a right to keep a ferry. . . . And it is difficult to imagine how ferry rights can be held by a corporation, or an individual, who have no right to keep a ferry.

The last and most important question in the case— did the state in chartering the Charles River Bridge *impliedly* agree not to charter another bridge to be erected within such proximity to the former as to diminish the tolls of the former, is next considered, and the Chief-Justice, by a consideration of the general law relating to grants by the state, and by a construction of the particular grants involved in this case,

shows that no such agreement could be implied, and hence that the grant to the Charles River Bridge was not impaired by the charter of the Warren Bridge.

Much has been said in the argument of the principles of construction by which this law is to be expounded, and what undertakings, on the part of the state, may be implied. The court think there can be no serious difficulty on that head. It is the grant of certain franchises by the public to a private corporation, and in a matter where the public interest is concerned. The rule of construction in such cases is well settled, both in England, and by the decisions of our own tribunals.

Then having shown that the rule was that in grants by the public nothing passes by implication, he proceeds:

When a corporation alleges that a state has surrendered for seventy years, its power of improvement and public accommodation, in a great and important line of travel, along which a vast number of its citizens must daily pass; the community have a right to insist in the language of this court above quoted "That its abandonment ought not to be presumed in a case, in which the deliberate purpose of the state to abandon it does not appear." The continued existence of a government would be of no great value, if by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation; and the functions it was designed to perform transferred to the hands of privileged corporations. . . . If this court should establish the new principle contended for, what is to become of the numerous railroads established on the same line of travel with turnpike companies; and which have rendered the franchises of the turnpike corporations of no value? Let it once be understood that such charters carry with them these implied contracts, and give this unknown and undefined property in a line of traveling, and

you will soon find the old turnpike corporations awakening from their sleep and calling upon this court to put down the improvements which have taken their place.

Taney's opinion in this case showed clearly that the "reserved rights" of the states were to be vitalized after their long coma. Said the Chief-Justice: "We cannot deal thus with the rights reserved to the states, and by legal intemperances and mere technical reasoning take away from them any portion of that power over their own internal police and improvement which is so necessary to their well being and prosperity."

In this case Webster for the first time met defeat before this court on a constitutional question.²⁶ The doctrine of the Dartmouth College Case which, as has been said by a learned lawyer and student of political science,²⁷ "had been pushed by its advocates to an extreme that would have left our state governments in possession of little more than the shell of legislative power" was wholesomely restrained.

The decision in the Charles River Bridge Case, though it found critics at the time in the extreme advocates of the Supremacy of the Federal Government, was generally received with favor. It would

²⁶ The Supreme Court of the United States, Carson, 305.

Webster writes to Justice Story relative to the decision of the court. "The decision of the court will have completely overturned, in my judgment, one great provision of the constitution." Life and Letters of Joseph Story, vol. II, 269.

²⁷ George W. Biddle, Address delivered before the Political Science Association of the University of Michigan, March 22, 1889.

seem that the public were beginning to view with alarm the centralizing influence of the court under Marshall. Story writes, after the decision, to Justice McLean, "The old constitutional doctrines are fading away, and a change has come over the *public mind* from which I augur little good."²⁸

Indeed, the Doctrine of States' Rights, always a popular doctrine in the South, was, before the Civil War served to render it unpopular elsewhere, by no means confined to that section. The states in all parts of the country guarded zealously their sovereignty, as a study of the constitutional cases of the period shows.

It is now generally agreed that the decision was not only technically correct, but essential to the well being and progress of the country; that the reverse of what Justice Story in his dissent predicted—the stagnation of improvements—has been the result. As has been said, this opinion of Taney's shows that he signally possessed "that insight, that unconscious sympathy with human progress, which induces a judge, while scrupulously administering law, to expand and advance and develop it commensurate with human needs."²⁹

In a series of cases known as the Corporation Cases, *The Bank of Augusta vs. Earl*, *The Bank of United States vs. Primrose*, and *the New Orleans and Car-*

²⁸ Life and Letters of Joseph Story, vol. II, 272.

²⁹ Clarkson Potter, Address before the American Bar Association, 1881.

rollton Railroad Company vs. Earl,³⁰ an important step forward was taken in the Federal jurisprudence governing corporations. It had already been established in the case of *The Bank of United States vs. Deveaux*,³¹ though with hesitation, that the court would look to the "character" of the persons composing a corporation plaintiff, and if it appeared that they and the defendants were citizens of different states, and that fact was properly set forth, the corporation might sue in its corporate name in the Federal courts. In the Corporation Cases the Court, through Taney, not only reaffirmed that ruling, but went farther and laid down a principle, the importance of which it would be difficult to overestimate.

In each of these cases the defendant was a citizen of Alabama, and the plaintiff a corporation composed of residents of states other than Alabama. In each case the plaintiff sued the defendant for non-payment of a bill of exchange which the plaintiff purchased in Alabama and of which the defendant was the indorser.

It was contended for the defendant in each case, and decided in accordance with that contention in the Circuit Court, that a corporation of one state had no power to make contracts in another state, hence, the contracts for the purchase of the bill of exchange, by the plaintiffs, were void.

We are so accustomed to the great volume of busi-

³⁰ 13 Peters' Reports, 519.

³¹ 5 Cranch's Reports, 61.

ness carried on by the banking corporations of the different states in states other than their own domicil, that it is difficult to realize that the right of such corporations to contract outside of the state of their creation was ever doubted. The states of the union, it was contended by the defendant, have extended to one another no other rights than those which are expressly given by the Constitution of the United States, and the court could not presume that a state acknowledges any rights in other states not so expressly secured. Said counsel:

Their union by the federal compact expressly settles the relation of the states to each other, and leaves no room for tacit or constructive comity to operate. The court instead of being alarmed from its duty by such appeals should feel encouraged to support the laws of state sovereignty, against which the pleas of comity and cries of politics are equally futile and unavailing in this court as now constituted.³²

By the general doctrines of private international law the right of a corporation to make such contracts in a foreign state as were not in contravention of the public policy of such foreign state would be presumed on the principles of comity. Hence the real contention of the defendants here was that the states by adopting the Constitution and therein expressly extending certain rights to the other states impliedly abrogated the rules of comity of international law as applied to the states of the Union. But Taney was no fonder of reading implications into the Constitu-

³² 13 Peters' Reports, 573.

tion when such implication favored a supposed state right than when it favored a supposed federal power; and in his opinion he steered the court away from this Scylla of perverted construction of the reserved rights of the states. He says:³³

The intimate union of these states, as members of the same great political family; the deep and vital interests which bind them so closely together, should lead us, in the absence of proof to the contrary, to presume a greater degree of comity, and friendship, and kindness toward one another, than we should be authorized to presume between foreign nations. . . . The history of the past, and the events which are daily occurring, furnish the strongest evidence that they have adopted towards each other the laws of comity in their fullest extent. Agencies for corporations engaged in the business of insurance and banking have been established in other states, and suffered to make contracts without any objection on the part of the state authorities. The silence of the state authorities, while these events are passing before them, show their assent to the ordinary laws of comity which permit a corporation to make contracts in another state.

But the Chief-Judge did not fall into the Charybdis of nationalization that Mr. Webster as counsel for one of the plaintiffs called "a Constitutional American view of the question." Mr. Webster contended that a corporation composed of citizens of one state is entitled to the benefit of that provision of the Constitution which provides that "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states," and that therefore under authority of *United States vs. Deveaux*,³⁴ the

³³ 13 Peters' Reports, 590.

³⁴ 5 Cranch's Reports, 61.

court should look beyond the act of incorporation, and if it should appear that the corporation consisted of citizens of Pennsylvania, since the citizens of Pennsylvania were entitled to all the rights in Alabama of the citizens of Alabama, then the plaintiff corporation not only had a right to make contracts in Alabama, but that it could not be deprived of that right even by an express provision in the Constitution or laws of Alabama. In this view of the case, said Mr. Webster, "I see no occasion to invoke the law of comity or international courtesy to our aid. Here our case stands independently of that law, on American ground, as an American question."³⁵

This proposition Taney emphatically denied, and planted himself and the court more firmly than ever on the reserved rights of the states. In a vigorous paragraph he demonstrated that Mr. Webster's contention was untenable, and that it would result in giving the citizens of one state *higher* rights in another state than the citizens of the latter state themselves possessed, and that it would deprive every state of all control over the extent of corporate franchises proper to be granted in the state, and corporations would be chartered in one to carry on their operations in another. He holds that the several states are sovereign states, and that as such they have adopted the rules of comity obtaining between such states. That, as in the case of a natural person, it is not necessary

³⁵ 13 Peters' Reports, 555.

that a corporation should actually exist in the sovereignty in which it enters into a contract. It is sufficient that its existence as an artificial person, in the state of its creation, is acknowledged and recognized by the law of the nation where the dealing takes place. Then if the law of its creation gives it authority to make contracts, and the state in which the contracts are made allows it to enter into such contracts, they are valid. But every power of this kind which a corporation exercises in another state depends for its validity upon the laws of the sovereignty in which it is exercised; and a corporation can make no valid contract without the sanction of that sovereignty express or implied. This implied sanction he finds in these cases under the rules of international law from the absence of any positive rule in Alabama denying the operation of foreign laws in her jurisdiction, not only in the silence of the state authorities on the question, but in the decisions of the state courts adopting the law of international comity in cases of suits by foreign corporations against the citizens of the state.

Important as was the decision of the court in these cases the principle underlying the decision was vastly more important, involving, as it did, the refusal of the court to adopt the Nationalist views of Webster, which had so often been ratified by the old court. Thus did Taney save to the states the vital right to say what corporations, chartered by one state, shall do business within another state and on what terms

such business shall be conducted. The importance of the preservation of this right in view of present conditions will be admitted by the most ardent Consolidationist.

It will be seen from this review that the court under the headship of Taney had checked somewhat the centralizing tendency of Marshall's decisions; but those persons who, like Justice Story, expected to see the Chief-Justice run amuck among the decisions of his great predecessor, for whom he had the greatest reverence, knew not the man. He had no more the desire to reduce the government to the ineffectiveness of the old Confederation than to reduce the states to the position of mere Departments of a central government.

When Marshall took his seat in Congress in 1799, Oliver Wolcott, in a letter to Fisher Ames, said of him, probably gleaning his opinion of Marshall's political views from the latter's speeches in the Virginia convention called to pass on the adoption of the federal Constitution, where his Federalism "roared gently as any sucking dove," "He is doubtless a man of virtue and distinguished talents, but he will think much of the state of Virginia, and is too much disposed to govern the world according to rules of logic; he will read and expound the Constitution *as if it were a penal statute*, and will sometimes be embarrassed with doubts of which his friends will not perceive the importance."³⁶

³⁶ Quoted in Memoir of Roger B. Taney, 267.

We have seen what a poor prophet was Wolcott. Justice Story with an equal lack of prophetic foresight wrote, after the decision of the Charles River Bridge case, to Justice McLean:³⁷ "There will not, I fear, ever in our day, be any case in which a law of a state, or of Congress will be declared unconstitutional." Taney was an ardent Federalist from his youth up, he upheld again and again the supremacy of the Federal government while Chief-Justice. His opinion of secession, or at least of secession while the country was engaged in a foreign war, may be gathered from his remarks in the Hartford Convention.³⁸

While the enemy was in the midst of us assailing our cities, and burning our houses, and plundering our property, and citizens of the state, without distinction of party, were putting forth their whole strength, and blending in its defence, those with whom the Maryland Federalists had been associated as political friends in the Eastern states, and whom they regarded and treated as the leaders of the party, were holding the Hartford Convention, talking about disunion, conferring with one another in secret conclave.

He repudiated the doctrine of nullification;³⁹ yet so far had the court under Marshall and Story gone beyond the Nationalist views of even the early Federalists, that after the decisions above reviewed Taney was regarded by those in sympathy with Marshall's construction of the Constitution as an apostle of "States' Rights" and even to-day he is associated in

³⁷ Life and Letters of Joseph Story, vol. II, 272.

³⁸ Memoir of Roger B. Taney, Tyler, 158.

³⁹ Ibid 187.

the professional mind as nearer to Calhoun than to Hamilton.

When his opinions have been more generally studied, and, without any preconceived political ideas in regard to the comparative value of a centralized or non-centralized government, and without the preceding opinions of the court as a point of departure, but in the light of the history of the adoption of the Constitution, it is believed that he will be recognized as the greatest *expounder* of the Constitution that ever sat on the Supreme Court bench, because the truest expounder of the intentions of those who framed that great instrument. It is his glory that with a sane mind untroubled by the criticism of partisans, sincere and otherwise, he so interpreted the Constitution or lent the weight of his influence to its interpretation as to preserve unimpaired to the states the rights reserved to them and at the same time to give full effect to all the powers granted by the states to the federal government.

Mr. Justice Story's prediction was very quickly falsified, for in Suydam and Boyd vs. Broadnax and Newton,⁴⁰ the right of a state, under an act of insolvency to discharge debts contracted in another state was denied by the Supreme Court. In 1842, in Dobbins vs. Commissioners of Erie County,⁴¹ the court upheld the authority of the United States as against the state of Pennsylvania, and reversed the Supreme

⁴⁰ 14 Peters' Reports, 67.

⁴¹ 16 Peters' Reports, 435.

Court of Pennsylvania which had held that a law of Pennsylvania imposing a tax on the office of a captain of a revenue cutter stationed in Pennsylvania was valid.

The court unanimously held that such a law was void as the compensation of an officer of the United States is fixed by Congress and such a tax would diminish the recompense and thus conflict with the law of Congress which secures such recompense in its entireness.

The next year, in *Bronson vs. Kinzie*,⁴² a law of Illinois was held to be unconstitutional on the very ground on which Story based his complaint, viz. that it violated the Constitutional provision prohibiting the passage of any law impairing the obligation of a contract. This case was followed the next year in *McCracken vs. Hayward*;⁴³ and in two cases decided in 1848, *Planters Bank of Mississippi vs. Sharp*, and *Baldwin vs. Payne*,⁴⁴ a state law was declared void on the same ground. Indeed in 1842, Justice Story himself had the satisfaction of writing the opinion of the court in the case of *Prigg vs. Pennsylvania*,⁴⁵ which held a statute of Pennsylvania unconstitutional.

In *Holmes vs. Jennison*,⁴⁶ a case of much interest, involving as it did a question that has never before or since arisen in the United States, the Chief-Justice de-

⁴² 1 Howard's Reports, 311.

⁴³ 2 Howard's Reports, 608.

⁴⁴ 6 Howard's Reports, 301.

⁴⁵ 16 Peters' Reports, 539.

⁴⁶ 14 Peters' Reports, 540.

livering an opinion in which Story, McLean and Wayne concurred, again upheld the power of the Federal government as against that of a state.

In 1847 the celebrated series of cases known as the License Cases—Thurlow vs. Massachusetts, Fletcher vs. Rhode Island, and Peirce vs. New Hampshire, came before the court.⁴⁷

The first two cases depended upon the same principle; the last differed in some respects but involved principles common to the other two. The main question raised by the cases was whether a state law regulating or prohibiting the sale of ardent spirits, the importation of which from foreign countries had been authorized by Congress, was repugnant to the provision of the United States Constitution giving to Congress power to regulate Commerce. It was the perennial question of the relative power of the states and the federal government.

In the Massachusetts case the plaintiff in error had been convicted under a law of Massachusetts for selling liquor without a license. He sought a reversal of the judgment on the ground that the act under which he had been convicted was repugnant to certain acts of Congress. Mr. Webster, his counsel, contended that the State law was unconstitutional under the principle of Brown vs. Maryland,⁴⁸ in that it was not auxiliary to, or coöperative with the legislation by Congress which admitted foreign spirits to be im-

⁴⁷ 5 Howard's Reports, 504.

⁴⁸ 12 Wheaton's Reports, 419.

ported, but was in contravention of such legislation, since it sought to discourage the sale of imported spirits to a greater degree than did the legislation of Congress.

He contended that as the Commissioners of Massachusetts under the State statute in question, were not compelled to grant licenses but only might do so if in their judgment the public good required it, that in conformity with the Massachusetts law all sales of spirits might be totally prohibited in Massachusetts in contravention to the act of Congress regulating the importation of spirits; that Congress has the constitutional power to determine what foreign articles shall enter into the consumption of the country, and be sold in the domestic market; that it had done so by levying a duty on foreign liquor; and since the act of Massachusetts was intended to contravene that determination it was unconstitutional and void. To prove his contention that the Massachusetts statute was not intended as an exercise of the police power merely, he showed that Massachusetts had not prohibited the *domestic* distillation of spirits; that five million gallons were distilled within her borders per annum, one-eighth of the whole product of the Union. In each case the State law was upheld. Nine opinions were delivered, one by Taney, three by McLean, two by Catron, and one each by Daniel, Woodbury and Grier.

The opinion of the Chief-Justice is so carefully thought out and is so clear in exposition that it ir-

resistibly compels the mind to his conclusions. He begins with adopting the principle of *Brown vs. Maryland*,⁴⁹ that an article authorized by Congress to be imported can not be taxed when imported, so long as it continues in the original bale or package, as that would interfere with foreign commerce. This decision he expounds and illumines; and he shows in a convincing way the soundness and sanity of the rule adopted in that case.

He refuses to go to the length of the "States Rights" doctrine of the counsel for Massachusetts, that a state can, under the police power, refuse to permit the importation of articles authorized by Congress to be imported, if such articles should be injurious to the citizens of the states.⁵⁰ He says:

It has indeed been suggested, that if a state deems the traffic in ardent spirits to be injurious to its citizens, and calculated to introduce immorality, vice, and pauperism into the state, it may constitutionally refuse to permit its importation, notwithstanding the laws of Congress; that a state may do this upon the same principles that it may resist and prevent the introduction of disease, pestilence or pauperism from abroad. But it must be remembered that disease, pestilence and pauperism are not the subjects of commerce, although sometimes among its attendant evils. They are not things to be regulated and trafficked in, but to be prevented as far as human foresight or human means can guard against them.

But spirits and distilled liquors are universally adapted to be subjects of ownership and property, and are therefore subjects of

⁴⁹ 12 Wheaton's Reports, 419.

⁵⁰ 5 Howard's Reports, 576.

exchange, barter and traffic, like any other commodity in which a right of property exists, and inasmuch as the laws of Congress authorize their importation no State has a right to prohibit their introduction.

He then goes on to hold that the laws of Massachusetts and Rhode Island imposing a license on all who retailed liquors, foreign as well as domestic, in the state, as they acted only upon the retail traffic in their own borders, and not upon the article while in the hand of the importer in the original package, was not unconstitutional even though one effect of such law might be to discourage the importation of spirits.

In this case as in many others Taney shows his ability as an independent thinker on Constitutional questions. After counsel has exhausted his arguments Taney will decide with him, after rejecting his arguments, on reasons worked out by himself, and not infrequently after an exposition of the fallacy of such arguments more incisive and convincing than that furnished by the opposing counsel.

In the New Hampshire case it appeared that a law of New Hampshire prohibited the sale of spirits without a license. The plaintiffs in error, merchants of New Hampshire, purchased a barrel of gin in Boston, brought it into New Hampshire and sold it, without a license, in the cask in which it had been imported. According to the doctrine of *Brown vs. Maryland*⁵¹ the article was at the time of sale sub-

⁵¹ 12 Wheaton's Reports, 419.

ject to the legislation of Congress. The case differed from *Brown vs. Maryland*, in that Congress had not legislated on the subject of such commerce between the states. Taney stated the question to be whether a state is prohibited by the Constitution from making any regulation of foreign commerce or commerce with another state when such regulation is confined to its own territory and does not conflict with any laws of Congress.

In other words, whether the grant of power to Congress to regulate commerce between the states is of itself a prohibition to the states, and renders all state laws upon the subject null and void. He said it was well known that a difference of opinion existed among the members of the court, but that with every respect for the opinion of his brothers:⁵²

It appears to me to be very clear the mere grant of power to the general government cannot, upon any just principles of construction, be construed to be an absolute prohibition to the exercise of any power over the same subject by the States. The controlling and supreme power over commerce with foreign nations and the several states is undoubtedly conferred upon Congress. Yet, in my judgment, the State may, nevertheless, for the safety or convenience of trade, or for the protection of the health of its citizens, make regulations of commerce for its own ports and harbors, and for its own territory, and such regulations are valid unless they come in conflict with a law of Congress.

This proposition, which he had laid down in *Prigg vs. Pennsylvania*,⁵³ in considering another

⁵² 5 Howard's Reports, 579.

⁵³ 16 Peters' Reports, 539.

clause of the Constitution, he maintains by a critical analysis of the Constitution, the Acts of Congress, and the prior cases.

He first points out that the language of the Constitution furnishes no warrant for any other construction, and there is not in this as in other grants, any prohibition on the states. The supremacy of the laws of Congress in cases of collision with state laws is secured in the article declaring that the laws of Congress passed in pursuance of the powers granted, are supreme. He points out that if the mere grant of power to Congress was, in itself, a prohibition to the states, there would be no necessity for providing for the supremacy of the laws of Congress, as there would be no such thing as conflicting laws.

He refers to the pilot laws and quarantine regulations, and shows that though these belong to foreign commerce, they have been continually regulated by the maritime states, and their regulations upheld by this court.

He shows that in analogous cases where, by the Constitution, power over a particular subject is conferred on Congress without any prohibition to the states the same rule of construction has prevailed, and such power has been held not to be exclusive. In *Houston vs. Moore*,⁵⁴ it was held that the power granted to the Federal government to provide for organizing and arming the militia, did not preclude state legislation on the same subject. In *Sturgis vs.*

⁵⁴ 5 Wheaton's Reports, 1.

Crowningshield⁵⁵ the same doctrine had been applied to the Constitutional provision, giving Congress power to establish uniform laws on the subject of bankruptcy. He discusses Gibbons vs. Ogden,⁵⁶ and shows that that case is not authority for the doctrine of exclusive power in Congress that it is usually relied on to prove. His discussion of the decision in this case justifies what was said of him by Mr. B. R. Curtis, "His power of subtle analysis exceeded that of any man I ever knew."

The writer has felt justified in treating these cases at large. They contained the first authoritative decision that the power of Congress over commerce was not exclusive; but that the States might pass laws on the subject if Congress had not acted.

The question had been debated ever since Gibbons vs. Ogden,⁵⁷ and that case had been cited as authority on both sides of the question. Even the judges who sat with Marshall when that opinion was rendered, Story and Thompson, disagreed as to what Marshall intended to hold in that case.

Justice Thompson quotes Chief-Justice Marshall's language in Gibbons vs. Ogden to show that he regarded the states as having concurrent power over commerce, and Justice Story cites the same case to show that Chief-Justice Marshall thought the power of Congress exclusive.⁵⁸

⁵⁵ 4 Wheaton's Reports, 196.

⁵⁶ 9 Wheaton's Reports, 1.

⁵⁷ 9 Wheaton's Reports, 1.

⁵⁸ See opinions of these two judges in New York vs. Miln, 11

Justices Catron, Nelson and Woodbury delivered opinions agreeing with that of the Chief-Justice that the power of Congress was not exclusive. Justices McLean, Daniels, and Grier put the case on other grounds, but did not dissent from Taney's view as to the concurrent power of the states, unless Justice McLean may be said to do so by inference. Justices Wayne and McKinley did not deliver separate opinions.⁵⁹

Peters' Reports, 102. Mr. Justice Thompson in New York vs. Miln, speaking of Marshall's opinion in Gibbons vs. Ogden, says, p. 148, "Here seems to be a full recognition of the right of a state to legislate on a subject coming confessedly within the power to regulate commerce, until Congress adopts a system of its own."

Mr. Justice Story in the same case says, p. 158, "It has been argued that the power of congress to regulate commerce is not exclusive, but concurrent with that of the states . . . in point of fact, the whole argument on this very question, as presented by the learned counsel on the present occasion, was presented by the learned counsel who argued the case of Gibbons vs. Ogden, 9 Wheaton's Reports 1; and it was then deliberately examined and deemed inadmissible by the court. Mr. Chief-Judge Marshall, with his accustomed accuracy and fulness of illustration, reviewed at that time the whole grounds of the controversy; and from that time to the present, the question has been considered (as far as I know) at rest. The power given to congress to regulate commerce with foreign nations, and among the states *has been deemed exclusive*; from the nature and objects of the power, and the necessary *implications* growing out of its exercise.

⁵⁹ A distinction, not made by Taney, is taken in some of the later cases, viz.: that where the subject upon which congress can act under its power over commerce is local in its nature or sphere of operation, and can be properly regulated only by special provisions adapted to their localities, the state can act until congress supersedes its authority; but when the subject is national and admits or requires uniformity of regulation, affecting alike all the states, congress can alone act upon it and provide the needed regulation. *Leisy vs. Hardin*, 135 United States, 100; *In re Rahrer*, 140 United States, 545. Yet

In the Passenger Cases—*Smith vs. Turner*, and *Norris vs. City of Boston*,⁶⁰ which came before the court at the same session, the “Commerce Clause” again demanded construction.

The first case, *Smith vs. Turner*, was brought to test the validity of an act that had been passed by the legislature of New York providing that the health commissioner, a state officer, should demand from the master of every vessel arriving at New York from a foreign port one dollar and a half for each steerage passenger, sailor, etc., and from the master of each coasting vessel the sum of twenty-five cents, with certain exceptions.

In *Norris vs. Boston*, the constitutionality of a law of Massachusetts was attacked. This law required a state officer to board every vessel arriving at any port in the state with alien passengers, examine into the condition of such passengers, and if any lunatic, idiot, maimed, aged, or infirm persons incompetent to maintain themselves should be found, to forbid such persons to land until the master, owner, etc., should give bond that such passenger should not become a public charge on the state for ten years. The third section provided that no alien passenger, otherwise entitled to land should be landed until the master, etc., of the vessel should pay a sum of two dollars

in the late case of *Lake Shore & Michigan Southern Railway Co. vs. Ohio*, 173 United States, 285, decided in 1898, the court seems to return to the doctrine of the concurrent power of the states. At least such is the view of the dissenting judges.

⁶⁰ 7 Howard's Reports, 283.

for each such passenger landing, the money collected to be appropriated to the support of foreign paupers. It was contended that both acts were in conflict with that clause of the Constitution of the United States giving Congress power to regulate commerce.

So great was the diversity of views among the judges that there was no opinion of the court, as a court. Five judges, McLean, Wayne, Catron, McKinley, and Grier, thought the state laws unconstitutional; four, Taney, Daniel, Woodbury, and Nelson, were of the opinion that the state laws were valid. So convincing were the arguments of the minority, especially those of Taney, that the fundamental question involved was left "in an uncertainty still more perplexing than when the discussion began."⁶¹

Justice McLean held that both state laws were invalid on the ground: (1) that they were attempts to regulate commerce, and that the power to regulate commerce was exclusively in Congress, and (2) that the laws in question were in conflict with existing acts of Congress. Of the other judges composing the majority some thought the power of Congress exclusive, some refused to discuss the question, holding that even if it were not exclusive, Congress had in fact acted, and that these states laws were in conflict with the laws of Congress, or with existing treaties.

Taney in an opinion unsurpassed for closeness of reasoning and nicety of discrimination between the

⁶¹ The Supreme Court of the United States, Carson, 333.

relative power of the State and Federal governments, plants himself firmly upon the proposition that as a state has the power of expelling from its borders persons it deems injurious to its welfare, and this was the principle of *Holmes vs. Jennison*,⁶² *Groves vs. Slaughter*,⁶³ and *Prigg vs. Pennsylvania*,⁶⁴ then it may meet such persons at the threshold and prevent them from entering. "For it will hardly be said that the United States may permit them to enter, and compel the State to receive them, and that the State may immediately afterwards expel them." If in the Massachusetts case, Massachusetts might reject such persons entirely, she might admit them upon such conditions as would protect her own citizens whether such conditions be a bond of indemnity or the payment of a sum of money. The right claimed by the state is a right of self-preservation as otherwise a state might be flooded with pauper immigrants.⁶⁵

The right of the State to protect itself against the burden of supporting those who come to us from European almshouses seems to be conceded in the argument. Yet there is no provision in the Constitution of the United States which makes any distinction between different descriptions of aliens, or which reserves the power to the State as to one class and denies it over the other. And if no such distinction is to be found in the Constitution, this court cannot engraft one upon it. The power of the State as to these

⁶² 14 Peters' Reports, 540.

⁶³ 15 Peters' Reports, 449.

⁶⁴ 16 Peters' Reports, 539.

⁶⁵ 7 Howard's Reports, 469.

two classes of aliens must be regarded here as standing upon the same principles. It is in its nature and essence a discretionary power, and if it resides in the State as to the poor and diseased, it must also reside in it as to all. . . . Most evidently the court cannot supervise the exercise of such a power by the State —this would be substituting the discretion of the court for the discretionary powers reserved to the State. Moreover, if this court should undertake to exercise this supervisory power, it would take upon itself a duty which it is utterly incapable of discharging. . . . How could it ascertain what had been the pursuits, habits, and mode of life of every immigrant, and how far he was liable to lose his health, and become, with a helpless family, a charge upon the citizens of the State?

The contention that the law of Massachusetts was a regulation of commerce, and that Congress had exclusive power to regulate commerce, he answers by saying that a majority of the court in the License Cases had held that this power was not exclusively in Congress. He then adds to what he said in the License Cases on the exclusiveness of the power of Congress, a reference from the *Federalist*:

Notwithstanding the affirmative grants of general authority, there has been the most pointed care in those cases where it was deemed improper that the like authorities should reside in the States, to insert negative clauses prohibiting the exercise of them by the States.

In the “Commerce Clause” it need not be said there is no such negative clause. After reviewing various acts of Congress and treaty stipulations, and showing that the laws in question were not in conflict with any such acts or treaties, he discusses the

ruling of the majority that passengers are "imports" and that as the states are forbidden by the Constitution from laying any imposts or duties on "imports," except what may be absolutely necessary for executing their inspection laws, the law in question was unconstitutional. He shows first that the word "imports" had uniformly been applied in England and America to property, and never to persons; that the point was directly presented in *Miln vs. City of New York*,⁶⁶ and it was then decided that passengers were not imports, he says:⁶⁷

The members of the convention unquestionably used the words they inserted in the Constitution in the same sense in which they used them in their debates. It was their object to be understood, and not to mislead, and they ought not to be supposed to have used familiar words in a new or unusual sense. And there is no reason to suppose they did not use the word "imports," when they inserted it in the Constitution, in the sense in which it had been familiarly used for ages, and in which it was daily used by themselves. If in this court we are at liberty to give old words new meanings when we find them in the Constitution, there is no power which may not by this mode of construction be conferred on the general government and denied to the States.

He answers the contention that the money demanded is a tax on the captain of the vessel, therefore a regulation of commerce, by showing both from previous decisions, and from the Federalist that if it be a tax upon the vehicle of commerce, it is within the taxing powers of the state, the state

⁶⁶ 11 Peters' Reports, 102.

⁶⁷ 7 Howard's Reports, 477.

being prohibited from imposing "a duty on imports" only, and passengers having already been shown not to be imports.⁶⁸

Here again we find Taney applying the canons of construction that with one exception always guided him in his search for the meaning of the Constitution. His continued study of that instrument, his reverence for the men who made it, and his sense of duty led him to decide that under his hand it should mean the same thing it meant under theirs, that his voice should speak its meaning as theirs would have spoken it had they occupied his place. His abiding belief in and love for this new government, which in that already troubrous time when dissension was in the air, he saw could continue to exist only by a firm insistence that the states and the Federal government trench not on each other's prerogatives, made him scrutinize carefully the charter of powers and rights. His inflexible sense of justice and honor, that would preserve to the states, to whose action the existence of the Federal government was due, the powers reserved to them; and his knowledge that to the Supreme Court of the United States was their only appeal; that while the states could never successfully encroach on the powers of the general government, they could never offer effectual resistance to such encroachment by the general government, led him, especially in a case like the present, to "require very plain and unambiguous words to convince

⁶⁸7 Howard's Reports, 479.

me that the states had consented thus to place themselves at the feet of the general government."

The decision in the case of the *Genessee Chief*,⁶⁹ decided in 1850, is considered by some as Taney's greatest contribution to our jurisprudence, and his opinion one of the ablest efforts of his judicial career.

The only important question involved in the case was whether an act of Congress giving the courts of the United States jurisdiction in admiralty in cases arising on the Great Lakes was constitutional, or whether the jurisdiction of these courts was limited by the Constitution to tide waters, as was the admiralty jurisdiction of the English courts at the time of the adoption of the Constitution. Taney, writing the opinion of the court held that the jurisdiction was not limited to tide waters, but that it embraced all navigable rivers and lakes where commerce is carried on between different states, or with a foreign nation.

The Chief-Justice meets the question with his usual intellectual frankness; he notes that the constitutionality of the statute had been supported by an author of repute, under the power granted to Congress to regulate commerce. But he refuses to take this enticing road out of the difficulty—a road in his opinion already too much traveled by the court in a search for jurisdiction. This action of Taney is the more admirable in that in this opinion alone does he exhibit any diffidence. Though never dog-

⁶⁹ 12 Howard's Reports, 443.

matic nor swayed by pride of opinion, he always proceeds with a calm assurance in the strength of the principles on which his conclusions are founded. In this case however, to one who reads it carefully and in connection with his other opinions there is a curious halting, an air of apology apparent. All the vigor of his great mind is there, his logic is as irresistible as ever, his grasp of principles as firm; but the feeling it leaves with one who studies it is that he is trying to convince himself of the conclusion he would arrive at.

If there is one thing characteristic of Taney's opinions it is that they always carry the conviction that he had studied the questions involved in all their phases with an open mind seeking the law. In this case the feeling left with the reader is that he had first decided what ought to be the law, and then had written his opinion to justify his conclusion. The keynote of his mental attitude in construing constitutional questions had always been "What did the framers of the Constitution intend?" In this case we find such language as this:

The language and decisions of this court whenever a question of admiralty jurisdiction has come before it, seemed to imply that under the Constitution of the United States the jurisdiction was confined to tide waters. Yet the conviction that this definition of admiralty powers was narrower than the Constitution contemplated has been growing stronger every day *with the growing commerce on the lakes and navigable rivers of the Western States.*

That is, the Supreme Court (in 1825),⁷⁰ before commerce had grown on the lakes, and therefore under circumstances more similar to those existing at the time of the adoption of the Constitution, had decided against such jurisdiction, but now "with the growing commerce on the lakes" (i. e., under different conditions) the conviction is growing that they were wrong.

This is the argument from expediency, and though usually veiled under the doctrine of "implied powers" may often be met with in previous decisions of the court; but it is a strange argument to hear from Taney's lips. Again he says, "It is evident that a definition that would *at this day* limit public rivers in this country to tide water rivers is utterly inadmissible." Here is the inference that a definition

⁷⁰ In *Waring vs. Clark*, on the question whether in the absence of statutes the admiralty jurisdiction of the United States extended to waters where the tide ebbed and flowed, but which were *infra corpus comitatus*, the court in holding that the jurisdiction did not so extend cites with *approval* the case of the *Jefferson* (10 Wheaton, 428), and quotes: "The admiralty never pretended to claim, nor could it rightfully exercise any jurisdiction, except in cases where the service was substantially performed, or to be performed, *on the sea or upon waters within the ebb and flow of the tide;*" (italics the courts) and again quotes with approval from *United States vs. Coombs* (12 Peters' 72), the same doctrine and reaches the conclusion that "the admiralty jurisdiction of the courts of the United States extends to *tide waters as far as the tide flows* though that may be *infra corpus comitatus*.

Having used, in 1847, the Case of *The Jefferson* to extend the courts' jurisdiction one step, to waters *infra corpus comitatus*, the same court in 1851 in order to still further extend that jurisdiction overrules *The Jefferson* on the ground that "If we follow it we follow an erroneous decision."

that might have been accepted by the framers of the Constitution in the then condition of the country must be changed to meet the changing conditions; that the powers given the court must be measured not by the intention of the framers, but by the supposed exigencies created by a new condition.

It is not intended by the quotations given above to convey the impression that Taney ignored the Constitution and claimed jurisdiction for the United States courts in cases arising on the Great Lakes solely on the ground of expediency. The Constitution merely provided that the judicial power of the United States should extend to "all cases of admiralty and maritime jurisdiction," not defining what was the extent of such jurisdiction. The Chief-Judge in his opinion undertakes to determine what the framers meant by the term "admiralty jurisdiction," and bases his conclusion squarely on what he thinks the intention of the framers. But a study of his opinion as a whole and especially in connection with his opinions on other great Constitutional questions inevitably leaves the impression that he allowed the supposed exigencies of the case to influence his mind to an extent that had his opinion in this case been delivered by another on another constitutional question he would have entered a vigorous, emphatic and overwhelming dissent. Taney did not reach the conclusion that the jurisdiction of the Federal courts extended above tidewater without flatly overruling a previous decision of the court when it was

presided over by Marshall, but he did more, he as flatly overruled the principle on which he himself had decided every important question of constitutional law which had previously come before him.⁷¹

The bitter opposition which Taney's nomination to the bench met in the Senate, was due entirely to political animosities engendered by his course as Secretary of the Treasury and Attorney-General, not to any doubts of his ability to fill the position for which he was nominated; and by this time Taney's judicial ability was recognized on all sides, and even those who had been his political enemies, and who had done all in their power to defeat his confirmation, paid him the tribute of their just admiration. Mr.

⁷¹ After reading the opinion of Taney in the Genesee Chief and the opinion of Justice Wayne in Waring vs. Clark, 5 Howard's Reports, 441, the student finds recurring to his mind the words of Justice Nelson (dissenting in New Jersey Steam Navigation Company vs. Merchants Bank, 6 Howard's Reports, 344, a case in which the same question of jurisdiction in admiralty was before the court), "What is this civil and maritime jurisdiction? . . . Although the Constitution and Act of Congress do not precisely define nor enumerate the former, nor prescribe in forms and precedents the latter, yet it will hardly be pretended, that either the substance or the forms of admiralty jurisdiction were designed by the founders of our jurisprudence to be left without limit, to be dependent on surmise merely, or controlled by fashion or caprice. They were both ordained in reference to some known standard in the knowledge and contemplation of the statesman and legislator, and the ascertainment of that standard by history, by legislation and judicial records must furnish the just response to the inquiry here propounded." This reads like Taney himself, and would make the common understanding of the term "admiralty and maritime jurisdiction" at the time of the adoption of the Constitution the test of the jurisdiction of the United States courts.

Clay, who had been most bitter in his attacks, made a personal apology, and testified to his great ability, characterizing him as a worthy successor to Marshall. Mr. Webster sought his counsel on matters of state, and Mr. Seward, who five years later when the dogs of war were straining at their leashes, carried away, it is charitable to presume, by the passions of the hour, made a venomous and unfounded accusation against Taney, not only asserted his own admiration of the Chief-Justice, but testified to the high regard in which Taney was held by the whole country.⁷²

It was at this point in his career that the celebrated case of Dred Scott vs. Sandford,⁷³ came before the Supreme Court. It is safe to say that no case that ever came before an Anglo Saxon tribunal was fraught with more momentous consequences, and that no judge has ever been more bitterly assailed, not even the infamous Jeffries, than was Taney

⁷² In a letter to Taney asking permission to dedicate to him a speech made by Seward in the Senate in favor of the French Spoliation Claims, he says:

"I am prepossessed with a belief that your convictions must be in favor of the justice of the claims of the American merchant for indemnity for French Spoliation, and I am sure that these convictions, if known, would have a great influence upon the public mind in favor of a law relating to that subject which has passed the Senate. I am desirous of the honor of inscribing my speech to you, as well for the consideration I have already presented, as because it would be an expression of the high regard which, in common with the whole American people, I entertain for you as the head of the Judicial Department. Memoir, Tyler, 317.

⁷³ 19 Howard's Reports, 393.

for his opinion in this case. The historical importance of the case and the indiscriminate abuse that has been heaped upon the opinions of the majority together with the gratuitous misrepresentations that have been made, and even continue to be made in regard to it, make it necessary to discuss the case at greater length than its apparent merely academic interest would seem to justify.

Dred Scott, a negro, brought an action in the Circuit Court of St. Louis County, Missouri, against Sandford for his (Scott's) freedom. There was a verdict and judgment in Scott's favor, but on a writ of error to the Supreme Court of Missouri, the judgment was reversed and the same remanded to the Circuit Court. Scott then abandoned this suit and brought action of trespass *vi et armis* in the Circuit Court of the United States for the district of Missouri, against Sandford, alleging that Sandford had assaulted him, his wife and children. The assault alleged was technical, and it was agreed that it was not unlawful if Scott, his wife and children were slaves of Sandford. Scott, in order to give the Circuit Court jurisdiction, alleged that he was a citizen of Missouri, and Sandford a citizen of New York. Sandford filed a plea in abatement alleging that Scott was not a citizen of Missouri because he was a negro of African descent whose ancestors were of pure African blood, and were brought into this country and sold as negro slaves, and that therefore the Circuit Court had no jurisdiction. To this there was a

demurrer which the court sustained, and the defendant was ordered to plead over.

Sandford then pleaded in bar that Scott was his slave, and hence the assault was justified. The case was tried before a jury which was instructed that the law was with the defendant, i. e. that Scott was a slave, whereupon Scott took a writ of error to the Supreme Court of the United States. The case was elaborately argued at the December term, 1855, and reargued in 1856 by Mr. Blair and Mr. Curtis for Dred Scott, and by Mr. Geyer and Mr. Reverdy Johnson for Sandford.

The facts of the case were that Scott had been a slave, belonging to Doctor Emerson, a surgeon in the United States Army. In 1834 Emerson took Scott from Missouri to the military post at Rock Island, Illinois, and held him there as a slave until April, 1836. At the time last mentioned Emerson removed Scott to the military post at Fort Snelling, in the territory then known as Upper Louisiana, and situate north of latitude thirty-six degrees and thirty minutes north, and north of the state of Missouri. Emerson held Scott in slavery at Fort Snelling until 1838. In 1838 Emerson removed Scott from Fort Snelling to the state of Missouri where they resided continuously up to the time of this suit. Before the commencement of the suit Emerson sold Scott to Sandford as a slave, and the latter had up to the time of the suit always claimed to hold Scott as a slave.

On the part of Scott it was contended, First: that

as slavery was forbidden by the law of Illinois, he became a free man by virtue of his residence in that state, and could not be again enslaved by being brought back into Missouri. Second: that as slavery was forbidden by the Missouri Compromise in that part of Upper Louisiana in which Fort Snelling was situate, he became free by virtue of his residence there. Third: that being free, he was a "citizen" within the meaning of that word as used in that clause of the Constitution, giving the Supreme Court jurisdiction in cases between *citizens* of different states.

Each of the judges except Wayne and Grier filed separate opinions. Four of the judges, Taney, Wayne, Grier, and Daniel held that Scott, being a negro whose ancestors were brought to this country and sold as slaves, even though he were free, was not a "citizen" within the meaning of the Constitution, hence the Circuit Court had no jurisdiction of the case. Curtis, dissenting, thought Scott if free, was a "citizen" of Missouri, and that he was free. The other judges thought this question was not before the court.

Taney in discussing this part of the case gave an elaborate review of the position of the African race in our political history, and demonstrated that the negro was not a "citizen" as that term was understood by the framers of the Constitution. The following is an outline of his argument: The words "people of the United States" and "citizens" are

synonymous terms. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the government through their representatives.⁷⁴

The rights of citizenship which a state may confer within its own limits must not be confounded with the rights of citizenship as a member of the Union. Previous to the adoption of the Constitution each state had the right to confer citizenship on whom it might, but such citizenship was confined to the state and gave no privileges in other states, except by comity.

The Constitution has conferred on Congress *exclusive* right of Naturalization, to confer citizenship on aliens, and while a state may still confer citizenship on any one it thinks proper as far as it is alone concerned, such rights of citizenship are restricted to the state which gave them, and it cannot confer those privileges of citizenship, such as the right to sue in the Federal Court, secured to a citizen of a state under the Federal government. No state can, since the adoption of the Constitution, introduce a new member into the political community created by the Constitution of the United States.

A consideration of the history of the period shows that the Constitution intended to make only those persons citizens who were citizens of the several states at its adoption, their descendants, and those

⁷⁴ 19 Howard's Reports, 404.

who should become members according to the provisions of the Constitution and the principles on which it was founded. That negroes were not regarded as of this class, is shown by the history and legislation of the time, and by the language of the Constitution. This history and this legislation shows, on the contrary, that a perpetual and impassable barrier was intended to be erected between the two races. It is impossible to believe that the southern states would have adopted a Constitution which might compel them to receive negroes, and give to them "all the privileges and immunities," etc., guaranteed by the Constitution to the citizens of the several states. Taney says:

It is difficult at this day to realize the state of public opinion in relation to that unfortunate race, which prevailed in the civilized and enlightened portions of the world at the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted. But the public history of every European nation displays it in a manner too plain to be mistaken.

They had for more than a century before been regarded as beings of inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior that they had no right which the white man was bound to respect;⁷⁵ and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic whenever a profit

⁷⁵ The language of the Chief-Judge, quoted in its connection as above, is a sufficient refutation of the often-repeated slander that he declared that a negro had (at the time of the decision) no rights that a white man was bound to respect.

could be made by it. And in no nation was this opinion more firmly fixed or more uniformly acted upon than by the English Government and English people. They not only seized them on the coast of Africa, and sold them or held them in slavery, but they took them as ordinary articles of merchandise to every country where they could make profit in them, and were far more extensively engaged in this commerce than any other nation in the world.

The opinion thus entertained and acted upon in England was naturally impressed upon the colonies they founded on this side of the Atlantic. And, accordingly, a negro of the African race was regarded by them as an article of property, and held, and bought and sold as such, in every one of the thirteen colonies which united in the Declaration of Independence, and afterwards formed the Constitution of the United States.

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The legislation of the different colonies furnishes positive and indisputable proof of this fact.⁷⁶

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The language of the Declaration of Independence is equally conclusive.

• • • •

It is too clear for dispute that the enslaved African race were not intended to be included, and formed no part of the people

⁷⁶ A law of Massachusetts provided "If any negro or mulatto shall presume to smite or strike any person of the English or other Christian nation, such negro or mulatto shall be severely whipped at the discretion of the justices before whom the offender shall be convicted." "None of his Majesty's English or Scottish subjects, nor of any other Christian nation within this province shall contract matrimony with any negro or mulatto." (Laws of Massachusetts of 1705, Chapter 6.) This law was in force at the time of the Revolution, and that part of it forbidding intermarriages was practically reenacted in 1786 and in 1836 which latter law increased the punishment of any one joining such persons in matrimony to imprisonment for six months and to a fine of not more than \$200.00.

who framed and adopted this declaration; for if the language (all men are created equal, that they are endowed by their Creator with certain inalienable rights; that among them is life, *liberty*, etc.) as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted.⁷⁷

He then shows that the Constitution took from the states all power by subsequent legislation to introduce any one as a citizen into the political family of the United States, and gave to Congress the power to confer this character upon those only who were born outside of the United States; no state law can give any right of citizenship out of its own territory. And since the power of Congress to establish a uniform rule of naturalization is confined to persons born in foreign countries, it is not in the power of

Connecticut passed a law in 1833 making it penal to establish a school in that State for the instruction of persons of the African race not inhabitants of the State. Rhode Island in 1822 passed a similar law.

In a supplementary opinion prepared by Taney and which is printed in the appendix to Tyler's Memoir, he further verifies his position on this part of the case.

"Jefferson who wrote the Declaration was a slave-holder; and Washington could say only "I never mean, unless some particular circumstance should compel me to it, to possess another slave by purchase." The *Boston Gazette and Country Journal* in its issue of July 22, 1776, in which was announced and printed the Declaration of Independence contained also the following advertisement.

TO BE SOLD.

"A stout, strong, healthy negro man, about twenty-five years of age; has had small-pox; can turn his hand to almost anything . . . Inquire of the printer." Memoir of Roger B. Taney, Tyler, p. 338.

the United States to raise to the rank of a citizen any one born in the United States, who by the laws of the country belongs to an inferior class. The intent of the framers is also shown, he says, in the first naturalization act passed in 1790 when many of the framers of the Constitution were in the halls of Congress. This act confined the right to become citizens to "aliens, being *free white* persons," and in the Act of 1813,⁷⁸ providing that "it shall not be lawful to employ on board any vessels of the United States any person or persons except *citizens* of the United States, *or* persons of color, natives of the United States." He next points out that the rulings and conduct of the Executive Department show the same wide difference between the two races. Opinions of Attorney-Generals Wirt and Cushing held they were not citizens, and Cushing refused to grant passports to them as citizens of the United States.

The right of a free negro in some states to vote does not necessarily make him a citizen even in those states, any more than withholding from women the right to vote denies them citizenship. By the laws of some of the states foreigners not *naturalized* are allowed to vote.

The dissenting opinion of Justice Curtis has been thought by some to furnish a complete answer to the argument of Taney on this part of the case. The writer believes that Justice Curtis utterly failed to capture the citadel of Taney's position, and barely

⁷⁸ 7 Statutes, 809.

succeeded by brilliant diversions in demolishing a few unimportant outworks. The main positions he not only leaves untouched, but only makes a skilful and misleading feint of attacking. When Taney shows that negroes were not generally regarded as citizens by the states at the formation of the government, it was all that it was necessary to show. Curtis cites the laws and constitutions of five states, giving the right to *vote* to every male inhabitant, but does not notice Taney's proof that citizenship did not necessarily follow the bestowal of the franchise; that *aliens* were, in some states, allowed to vote. He answers an elaborate and most pertinent discussion of Taney's by saying, "I shall not enter into an examination of the existing opinions of that period (the period of the adoption of the Constitution) respecting the African race." Once, at least, we find this kind of reasoning.

It has often been asserted that the Constitution was made exclusively by and for the white race. It has *already been shown* that in five of the original thirteen states colored persons then possessed the elective franchise, *and were among those by whom* the Constitution was ordained and established.

Now in point of fact it had not "been shown" that negroes were among those by whom the Constitution was ordained, he himself had asserted previously, more carefully, only that "they doubtless did act."

His argument on this part of the case finally leads him, notwithstanding the reliance he has previously placed on the fact that five states allowed the negro

the franchise, to the conclusion that "citizenship under the Constitution of the United States is not dependent on the possession of any particular political, or even of all civil rights."⁷⁹

Taney next discusses the question whether Scott's removal to and residence in the territory north of thirty-six degrees thirty minutes north latitude, and not included in the limits of Missouri, made him free under the Act of Congress known as the Missouri Compromise which provided that slavery should be forever prohibited there. He reaches the conclusion that it did not. That the Act was unconstitutional and void. To this conclusion Justices Wayne, Grier, Daniel, Campbell, and Catron assented. Justice Nelson gives no opinion on this point, and Justice McLean and Curtis dissent.

Taney held that the article of the Constitution conferring on Congress the power "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States" is confined and was intended to be confined to the territory which at the time of the adoption of the Constitution belonged to the United States and that it did not apply to the territory subsequently acquired from France. That it was a special provision to meet known and present emer-

⁷⁹ It had been held as far back as 1804 by Chief-Judge Marshall, in *Hepburn vs. Ellzey*, 2 Cranch, 445, that a citizen of the District of Columbia could not maintain an action against a citizen of Virginia in the federal courts; and in 1816 the same judge held that the same disability attached to the citizen of a territory.

gency and nothing more, and that whatever power Congress possesses, and such power he does not deny, to govern territory acquired since the adoption of the Constitution is not derived from this article of that instrument, but is a result of the right to acquire territory. This conclusion he maintains by a verbal exegesis and historical review of the Constitution, subtle, illuminating, and convincing.

Addressing himself to the broader aspects of the question he adopts the principle, that whatever territory the United States acquires "it acquires for the benefit of the people of the several states who created it." It is acquired as the representative and trustee of the people of the United States, and it must therefore be held in that character for their common and equal benefit. The government and the citizen both enter it under the authority of the Constitution with their respective rights defined, and the Federal Government can exercise no power over the citizen's person or property beyond what that instrument confers, nor lawfully deny any right which it has reserved.

The fifth amendment provides that no person shall be deprived of life, liberty or property without due process of law. And an Act of Congress which deprives a citizen of his property (in his slaves) merely because he comes himself and brings his property into a particular territory of the United States, can hardly be dignified with the name of due process of law. The right of property in slaves is recognized by the Constitution, and the government is expressly

pledged to protect it in all future time, if the slave escapes from his owner. No word can be found in the Constitution which gives Congress any greater power over slave property than property of any other description. The only power conferred is the power and duty of protecting the owner in his rights in it. Whence then does Congress derive power to confiscate this property when taken by a citizen of the United States into territory of the United States?

The argument of Justice Curtis in favor of the power of Congress to abolish slavery in the territory of the United States under the provision of the Constitution giving Congress power to make "all needful rules and regulations," is very strong, but it ignores the history of slavery in connection with the Constitution and the political union of the states, and fails, to the mind of the present writer, to meet the questions raised by Taney as to the peculiar wording of that provision if it were intended to apply to territory to be afterward acquired.

The remaining point in the case, whether the effect of Scott having been taken from Missouri into Illinois was to make him a free man, the Chief-Judge discusses very briefly since it had been previously decided in *Strader vs. Graham*⁸⁰ that when a slave had been taken or allowed to go from a slave state to a state in which slavery was forbidden, his status, on his return to his original domicil, was governed by the law of that domicil. This point is elabo-

⁸⁰ 10 Howard's Reports, 82.

rately and convincingly treated by Justice Nelson, who arrives at the same conclusion.

The decision of this case was eagerly awaited. During the years immediately preceding it events had been hurrying to a climax. The whole country was writhing in the first throes of what was to prove a titanic conflict. The Kansas-Nebraska bill had superseded the Missouri Compromise; for three years the desperate struggle had been waging between the North and South for the possession of Kansas and civil war was raging there. To paraphrase Burke, reason had been driven from her throne and passion had usurped her seat. The Republican party had sprung into being pledged to resist the extension of slavery. It was at this psychological moment that the Dred Scott decision was made.

A prophetic ear might have caught even then beneath the calm voice of the venerable Chief-Justice as he delivered this opinion the thunder of the guns on Fort Sumter. The newly elected President had announced in his inaugural two days before that a case was pending in the Supreme Court which might appease the gathering storm. It can be easily imagined therefore with what joy the decision was hailed by the South, and with what bitterness it was execrated at the North. Unassailable in the logic with which it declared unconstitutional the aim and purpose of the Republican party, the vituperation of partisan abuse was the more fiercely hurled at it. In a wild effort to discredit it, the leaders of the dis-

pointed party did not scruple to accuse the Chief-Justice of a monstrous conspiracy with the leaders of the Democratic party and the President, by which the case was brought, argued, and decided for political purposes.⁸¹

⁸¹ Seward and Lincoln both made this charge, the former directly, the latter by innuendo. Seward said in the Senate, March 3d: "Before coming into office, Buchanan approached or was approached by, the Supreme Court of the United States. . . . The court did not hesitate to please the incoming President by . . . pronouncing an opinion that the Missouri prohibition was void." Quoted in Rhodes's History of the United States, vol. II, 268.

Lincoln said in a speech delivered at Springfield, June 16th: "When we see a lot of framed timbers different portions of which we know have been gotten out at different times and places and by different workmen—Stephen, Franklin, Roger and James, for instance—(Stephen A. Douglas, Franklin Pierce, Roger Taney and James Buchanan) and when we see these timbers joined together and see they exactly make the frame of a house or a mill, all the tenons and mortices exactly fitting, and all the lengths and proportions of the different pieces exactly adapted to their respective places, and not a piece too many or too few, not omitting even scaffolding—or if a single piece be lacking, we see the place in the frame exactly fitted and prepared yet to bring such piece in—in such a case, we find it impossible not to believe that Stephen and Franklin and Roger and James all understood one another from the beginning, and all worked upon a common plan or draft drawn up before the first blow was struck." Quoted in Rhodes's History of the United States, vol. II, 270. Mr. Rhodes after saying "This charge was indeed unsupported by evidence, and was only suggested by a striking coincidence of events," p. 271, adds, curiously enough, "As politics go, the argument of Lincoln was perhaps allowable. . . . For all the Republicans of 1857 and 1858 required satisfying reasons, and this charge of conspiracy between the governmental departments seemed well adapted for the purpose." p. 271.

Mr. Reverdy Johnson, of counsel for Sandford, in an answer to this charge said:

"The Senator's (Seward) insinuation that the case was made by the master for the purpose of obtaining a decision by the Supreme

The only foundation for this charge was the statement of the President in his inaugural, that the question as to the time when the people of a territory might exclude slavery was "a judicial question which rightly belongs to the Supreme Court of the United States, before whom it is now pending, and will, it is understood, be speedily and finally settled." This clause was not inserted in the inaugural until he arrived in Washington on March 2d, and on that day the decision was forecast in the *New York Tribune*. Indeed many decisions of the court have before and since that time been known before the opinion has been read. Rhodes remarks:⁸² "Judges have confidential friends." He might have adduced in proof of this fact that Justice Curtis, who dissented in this case, wrote on April 8th, 1856, to Ticknor, concerning it, "The court will not decide the question of the Missouri Compromise line,—a majority of the judges being of the opinion that it is not necessary to do so."⁸³

With the passing of the passions that gave them birth, some of the charges that were then made are now remembered only as evidence of the length to

Court, is so far from being true, that the suspicion at the time was that the political friends of the Senator—the abolitionists—had had it instituted and brought here with that exclusive end. But this was equally unfounded, as was stated by Mr. Blair in open court, and a few days afterwards, in a communication to the *National Intelligencer*.^{*} Mr. Frederick Trevor Hill has effectively disproved both charges and counter charges. "Decisive Battles of the Law," *Harper's Monthly Mag.*, July, 1907.

⁸² History of the United States, vol. II, 269.

⁸³ Quoted in Constitutional History of the United States, Von Holst, vol. 6, 27 n.

which partisan malice will go in hounding its victim. Even the critics of Taney now ridicule the charge of conspiracy with the President.⁸⁴ Some of the attacks on this case are, however, still reiterated and believed. It is said that the subject matter of the suit was a political, not a judicial question, and should not have been decided by the Court. It is admitted that the Court should not undertake to decide political questions. Indeed we have seen that Taney himself applied the doctrine that the court would not decide such questions. But to apply this doctrine to a question political in the sense in which the question involved in the Dred Scott case was political is either to misunderstand curiously or to misrepresent the doctrine. Is the court to refuse to pass on the constitutionality of an Act of Congress or to construe the Constitution, to abandon one of its most important functions, because, forsooth, a political party chooses to make of that Act a shibboleth, or base its platform on its own interpretation of a constitution provision? Shall the court refuse to con-

⁸⁴ See History of the United States, Rhodes, vol. II, 269; History of the Supreme Court, Carson, p. 375. Mr. Carson says of this charge and the charge made by Von Holst (Constitutional History of the United States, vol. V, 19 *et seq.*) that a systematic effort had been made by the Southern leaders to secure a preponderating position of influence in the Supreme Court in anticipation of such question arising, so that "orthodoxy on the slavery question had come to be a qualification for a seat on the supreme bench," "although bitter partisans might assume that some such deep laid plot had been successfully carried out, yet no one who temperately and calmly considers the facts as developed from the decisions of the Supreme Court itself, and the correspondence of the day, can arrive at any such decision."

sider the constitutionality of an income tax law because it is a plank in the Republican platform, or to pass on the legality of a Philippine Tariff Act because the Democratic party has made an issue of the occupation of the Philippines?⁸⁵

Another set of critics of this case attack it on the ground that it overthrew a law that had been accepted since 1820. This view, it should be said, is advanced not by lawyers but by political historians. The answer to it is obvious; in the first place the constitutionality of the Act of 1820 had been frequently questioned.⁸⁶ In the second place, it would be intolerable that an Act of Congress originally unconstitutional should become constitutional because for a time no one saw fit to test it. It would, in effect, be

⁸⁵ Judge Taft speaking of another case takes a different view of the functions of the court. In a recent address before the American Bar Association he says, "Beginning then as *arbiter in a political conflict* and wielding similar powers until to-day, the Federal Judiciary have never enjoyed immunity from hostile attack—upon their conduct or their motives This is but one of the many historical instances showing how the Federal courts may be subjected to the most severe criticism without just grounds *merely because of the character of their jurisdiction.*" (Ital. the writer's.)

⁸⁶ For example Thomas Jefferson writing to John Holmes in 1820 while the bill was before congress says: "This momentous question, like a fire bell in the night, awakened and filled me with horror. I considered it at once as the knell of the Union. . . . An abstinence too, from this act of power, would remove the jealousy excited by the undertaking of congress to regulate the condition of the different descriptions of men composing a state. *This certainly is the exclusive right of every state, which nothing in the constitution has taken from them and given to the General Government.*" (Italics the writer's.) Writings of Thomas Jefferson, Edited by Ford, vol. X, 157, 158.

a method of amending the Constitution by an Act of Congress combined with an acquiescence in that Act, a method not provided for in that instrument, and, it is submitted, not to be "implied" by the most ardent latitudinarian.⁸⁷

The most serious criticism then made and still made on the case (or at least on that part of it, that deals with the constitutionality of the Missouri Compromise), is that having decided that Scott was not a citizen, and hence that the court had no jurisdiction of the case, the court should have dismissed the case and refused to discuss the validity of the Missouri Compromise. The resources of the language have been well nigh exhausted of their vituperative epithets in the efforts that have been made to characterize adequately this judicial crime of Taney in pronouncing an opinion on a point not necessary to the decision of the case. "Invalid usurpation," "perversion of the law," "bold assumption," "political enormity," "a blunder worse than a crime," "the lowest depth," and other choice rhetorical phrases have been

⁸⁷ In the License Cases Taney met this argument. He says (p. 514), "The Constitution does not attempt to define these limits (the limits of State and Federal power over commerce). They cannot be determined by the laws of Congress or of the States, as neither can by its own legislation enlarge its own powers." Von Holst with all his ingenuity buttressed by a strenuous prejudice against anything that made for the extension of slavery could advance no argument to prove that the case dealt with a political as distinguished from a legal question that would not have applied with equal force to other decisions of the court that were never questioned. So he like most of the critics of this case abandons argument and takes refuge in invective. (See vol. V, 46.)

hurled at the head of the devoted judge by pamphletters, and even by historians.⁸⁸

It will be seen by a reference to the record of the case as above set forth that in the shape in which the case came to the Supreme Court there were several possible views of what questions were before the court. Each of these views found one or more adherents among the judges. Justice Wayne thought that the whole record was before the court, both the plea to the jurisdiction and the merits, and gave judgment against Scott on both. Justice Nelson was of the opinion that after the defendant's plea to the jurisdiction, the plaintiff's demurrer thereto, and the judgment of the court below sustaining the demurrer, and the defendant's pleading over, the defendant by pleading over waived his plea to the jurisdiction, and hence the plea was not before the court for review, but only the merits. He gave judgment on the merits against Scott. Mr. Justice Grier thought that as the record showed a *prima facie* case of jurisdiction the Supreme Court was required to decide all questions properly arising in it. Justice Campbell seems to have been of the same opinion as Justice Nelson, that the plea to the jurisdiction was waived. He says, "My opinion in this case is not affected by

⁸⁸ Even the distinguished historian of the Supreme Court, Mr. Carson, says (p. 293), "Upon this fair record but one blot appears. The 'damned spot' of the Dred Scott decision will not out, and though other illustrious names must share in the infamy of that fatal blunder, yet the Chief-Justice by virtue of his eminence must carry the blood stain on his ermine to eternity."

the plea to the jurisdiction, and I shall not discuss the question it suggests." He then decides the case on its merits against Scott. Justice Daniel says the contention that by pleading over the defendant waived his plea to the jurisdiction cannot be maintained. He discusses the plea, holds that the court had no jurisdiction, and says the plea in bar might be passed over as not requiring examination, but as the questions involved are of great importance he thinks they should be decided by the court, and he decides them against Scott. Justice Catron thinks the plea to the jurisdiction was waived, and writes an opinion on the merits against the contention of Scott. Justice McLean, dissenting, holds that the plea to the jurisdiction is not before the court, not on the ground, however, that it was waived by the defendant's pleading over, but on the ground that since it was decided in favor of Scott, he being the appellant, could not complain of it. He then discusses the merits and decides in favor of Scott. Justice Curtis, also dissenting, thinks the plea was not waived by defendant's pleading over, and says it is not necessary to determine whether the appellant can be allowed to assign want of jurisdiction as an error in a judgment in his own favor. He discusses the plea to the jurisdiction, and concludes that it was bad, and that the decision of the lower court in overruling the plea was correct; and then proceeds with the merits of the case, reaching a conclusion in favor of Scott.

Taney thought with Wayne, Grier, and Daniel

that both questions were before the court. He held that the court below committed an error in deciding that it had jurisdiction, that it was the duty of the Supreme Court to correct this error, but that that could not be done by dismissing the case for want of jurisdiction in the Supreme Court for that would leave the erroneous judgment—the judgment in favor of Sandford—in full force, and the injured party without a remedy; that the correction of one error did not deprive the appellate court of the power of examining further into the record and correcting other errors which might have been committed. He points out the difference in this respect between appeals from the state courts and appeals from the inferior United States courts, and states that this is the universal practice of the court. He therefore discusses, first the question of jurisdiction, and, after deciding that the Circuit Court had no jurisdiction, he considers the merits of the case and decides against Scott.

As a technical question of practice, the writer is of the opinion that Taney and his three associates, erred in thinking the merits of the case before them after deciding that the Circuit Court had no jurisdiction, just as he thinks Justice McLean, of the minority, was wrong in holding that the plea to the jurisdiction was not before the court but only the merits; but that the question was then not a settled one is apparent from a perusal of the opinions in this case, and the authorities cited therein.

Why then should Taney's reputation have been so bitterly assailed for the error? Were extrajudicial opinions then unknown in our reports until the Dred Scott case? On the contrary it would be safe to say that no judge who ever sat on the Supreme Court bench did not at one time or another pronounce an opinion on some point not necessary to the decision of the case before him. In *Ex parte Christy*⁸⁹ Justice Story indulged in dicta similar to Taney's, but perhaps the most illustrious example is that of Chief-Justice Marshall in *Marbury vs. Madison*,⁹⁰ in which case holding in an opinion which covered eight pages of the report that the court has no jurisdiction in the case, the Chief-Justice devotes twenty pages to a discussion and decision of the questions whether a right of the plaintiff has been violated and whether the law affords a remedy for such violations; reaching an affirmative conclusion as to both questions. It is true the Chief-Justice avoids the appearance of writing *dictum* by reversing the natural order, and discussing the question of jurisdiction last, but this only veils the *dictum*, it does not eliminate it. Add to this that the effect of Marshall's extrajudicial utterances was to reflect on the conduct of his personal and political enemy, Jefferson, then if Taney for his *dicta* be *anathema* Marshall must be *anathema maranatha*. Indeed any student of the decisions of the Supreme Court must know that though there were occasional

⁸⁹ 3 Howard's Reports, 292.

⁹⁰ 1 Cranch's Reports, 137.

protests by individual judges, the members of the court were never much concerned with the question whether what they wrote was technically extrajudicial. If the question had been fully argued by counsel in the case, and curiously enough, if it was a constitutional question, and one of importance, they discussed it without any qualms of the judicial conscience.⁹¹

⁹¹ In *Hans vs. Louisiana*, 134 United States, at page 20, the court says, speaking of Marshall's opinion in *Cohen's vs. Virginia*, 6 Wheaton, 264, "It must be conceded that the last observation of the Chief-Justice does favor the argument of the plaintiff. But the observation was unnecessary to the decision, and in that sense *extra judicial*." In *Leisy vs. Hardin*, 135 (United States Reports, 100), the decision is in part based on language of the same great judge in *Brown vs. Maryland* (12 Wheaton's Reports, 419), which, it is pointed out in the dissenting opinion, was "obiter dictum, wholly aside from the question before the court and having no bearing on its decision, and therefore *extra judicial*." p. 134. In *Prigg vs. Pennsylvania* (16 Peters' Reports, p. 627), Taney dissenting says "I do not consider this question as necessarily involved in the case before us. But as the question is discussed in *the opinion of the court* and I do not assent . . . I proceed to state very briefly my reasons." In the same case Justice Daniel finds himself obliged to write an opinion dissenting from a part of the opinion of the majority, written by Story, which he considers *extra judicial*, though he agrees in result with the majority.

In *Holmes vs. Jennison* (14 Peters' Reports, 540), Justice Baldwin aligns himself with Marshall, Story and Taney by first deciding that the court had no jurisdiction, and then writing an opinion on the merits.

In *Martin vs. Waddell* (16 Peters' Reports, p. 410), the court says in relation to a point argued "And we the more willingly forbear to express an opinion on this subject, because it has ceased to be a matter of much interest in the United States." Not because it was not involved in the case before the court.

In *Carpenter vs. The Providence, etc. Insurance Co.* (16 Peters' Reports, p. 510), Justice Story begins a page of extraneous matter

Again admitting that what was said by Taney on the merits of the case was technically *dictum*, there was more excuse for the pronouncement of such *dictum* in this case than in most cases in which the judges have so offended: for it must be remembered that not only were the merits of this case elaborately discussed in argument and reargument, but the questions raised by the plea to the jurisdiction and the

thus: "This leads us to say a few words upon the nature and importance and sound policy respecting notice of prior and subsequent policies."

In the License Cases (5 Howard, 504), Justice Daniels accuses all the other judges of a pronouncement of *dicta*, and Justice Catron says, (p. 449), "I had not intended to examine the question presenting the State right claimed, but it has become so involved in the discussion at the bar and among the judges that silence cannot be consistently observed.

In the Passenger Cases (7 Howard, 283), the insistence of Justice McLean in discussing the question whether the power in Congress to regulate Commerce is *exclusive*, required the other justices to write separate opinions. Justice Wayne says the other justices do not differ with McLean except that "a majority of us do not think it necessary in these cases to reaffirm . . . what this court has long since decided."

In Bank of United States vs. United States (2 Howard, 711), McLean writing of the opinion of the court says (p. 734) "Before we consider the rulings of the court excepted to, it may not be improper to notice the structure of the bill (of exchange in suit) which has been much commented on by the counsel; *though not having been excepted by the Government, it is not a matter for decision.*" In Dred Scott, not only was the Missouri Compromise commented on by counsel, its constitutionality was directly brought in issue by the reliance of Dred Scott on its efficacy. But remarkable as it may seem when the former case came again before the court and the majority considered the question of the structure of the bill an open one and decided contrary to the view of its structure taken in the *dictum*, Justice McLean dissents and says "It is true the structure of the bill, and the liability of the Government to the damages claimed, not being

merits were *fundamentally the same question*—the status of Scott. Scott's appeal to the jurisdiction of the court was grounded on his claim of freedom, his right to recover in trespass was likewise conditioned on the fact of his freedom, and he himself based his right to freedom in part on the Missouri Compromise. Any discussion of his status as slave or free therefore would have been incomplete without a discussion of this act, though the discussion of the Act was not necessary to the decision of the case. Moreover, Scott himself contended that the plea in bar waived the plea in abatement, and he therefore himself asked that the merits be discussed.

The writer mentions these facts merely to show that if there ever can be a case in which a judge is justified in considering the merits of a case after holding that the court was without jurisdiction, and it has already been shown that this has been done by some of our greatest judges, this was such a case. That the judges in the Dred Scott case acted from the purest motives is no longer denied by the candid-minded, indeed it is no longer doubted that they believed they were not only technically right in their action, but that it was a patriotic duty to consider all the ques-

points made in the former bill of exceptions, were not authoritatively adjudged. But these points *were so connected* with the construction of the Maryland statute, the question then before the court, that neither the counsel nor the court could escape their consideration."

Apply this language of the learned judge to the Dred Scott case, and not only was the decision on the Missouri Compromise perfectly proper, but even binding in a subsequent case.

tions that had been argued, and for the answer to which the country looked to them, and not to allow the case to be dismissed on the technical question of jurisdiction involving, as that question did, the broader question of the merits of the case.⁹²

⁹² Rhodes in his history of the United States, vol. II, 253, speaking of the cause which led the court to decide to treat the question of the constitutionality of the Missouri Compromise in its decision, says "But there now began a pressure on the Southern judges, who constituted a majority of the court, to decide the weighty constitutional question involved (sic) in the case. . . . Of course the pressure was adroit and considerate, for the judges were honest men impressed with the dignity of their position. The aim was simply to induce them to promulgate officially what they privately thought." The pressure must have been so *adroit* that Rhodes himself in spite of his statement of it seems not convinced of it for a few pages later (p. 269) he says: "*If any one used personal influence with Taney.*"

As a matter of fact Justice Campbell who took part in the decision, in a letter to Samuel Tyler, written in 1870, which letter is cited by Rhodes, says, "I have not the slightest information of any connection between Mr. Buchanan or any other person, with the discussion in the Court, or the conference, or with the preparation of any opinion of either of the judges, save the judges themselves." Memoir of Roger B. Taney, Tyler, p. 384. Since this letter and one of Justice Nelson are important evidence on this question setting forth at length the circumstances under which it was decided to treat the question of the validity of the Missouri Compromise that portion of them dealing with this subject is subjoined. Justice Campbell says in part. "He (Dred Scott) claimed that he became free under the operation of the act of Congress of the 16th of March, 1820, prohibiting slavery in the territory north of $36^{\circ} 30'$ north latitude. The majority of the Court determined that the act of Congress did not operate upon Dred Scott under the particular circumstances of his case, and *also that it was inoperative in any case to liberate a slave.* The instruction of the majority, in reference to the preparation of this opinion, was to limit the opinion to the particular circumstances of Dred Scott; and Mr. Justice Nelson prepared his opinion on file, under this instruction, to be used as the opinion of the Court. Subsequently, and before it was read, upon a motion of Mr. Justice Wayne, who stated that the case

Finally admitting that the first four judges mentioned were mistaken in discussing the merits after deciding that the Circuit Court had no jurisdiction, and should have dismissed the case; the case would still have had to be decided on its merits because four of the judges thought nothing else was before

had created public interest and expectation, that it had been twice argued, that an impression existed that the question argued would be considered in the opinion of the Court, he proposed that the Chief-Justice should write an opinion on all the questions as the opinion of the Court. This was assented to; some reserving to themselves to qualify their assent as the opinion might require. Others of the Court proposed to have no questions, save one, discussed. It was under these circumstances that the Chief-Justice undertook that opinion. The motion of Mr. Justice Wayne was made without any notice to me, and I do not know that he gave notice to any one of the members of the Court. The apprehension had been expressed by others of the Court that the Court would not fulfil public expectation or discharge its duties by maintaining silence upon these questions; and my impression is that several opinions had already been begun among the members of the Court, in which a full discussion of the case was made, before Justice Wayne made this proposal. I have not the slightest information of any connection between Mr. Buchanan or any other person, with the discussions in the Court or the conference, or with the preparation of any opinion of either of the judges, save the judges themselves."

Justice Nelson who read this letter wrote, "I have read with care the letter of Judge Campbell . . . and concur with him as it respects the facts, or history of the decision in that case, so far as they came within my knowledge." Memoir of Roger B. Taney, p. 385.

That Justice Wayne knew of the public expectation is no evidence that any pressure was brought to bear on him. One must have been indeed a hermit not to know of the public interest in the case. Mr. Justice Curtis evidently knew of it for he writes eight months before the decision, to Ticknor, "The Court will not decide the question of the Missouri Compromise line." Von Holst, vol. VI, 27 n. Yet we hear nothing of "adroit pressure" having been brought to bear on him to take that view of the case which would render a discussion of the Missouri Compromise relevant.

the court, and one, Justice Curtis, from the view he took of the plea in abatement, was obliged to decide the case on its merits.

It is submitted in view of the considerations presented that if Taney and his fellow judges were guilty of the pronouncement of *dicta* in the Dred Scott case, instead of being singled out for execration as they have been their action in this case is less culpable than that of other judges who have sat on the Supreme Court bench.

As to the correctness of the decision of the court on the unconstitutionality of the Missouri Compromise there will doubtless always be a difference of opinion corresponding with the different views as to the relation of the states to the Federal government. It is well known that many of our statesmen thought it unconstitutional at the time of its adoption and afterward, and that the president who signed it had such grave doubts of its constitutionality that he submitted it to his cabinet for their advice in that particular. This much must be admitted, however, that the decision not only did not overrule any previous decision of the court, as did the ruling in the *Genessee Chief*, for which Taney has been much lauded, but that it was directly in line with the previous cases. The court had in *Prigg vs. Pennsylvania*,⁹³ *Jones vs. Van Zandt*,⁹⁴ and *Williamson vs. Daniel*,⁹⁵ and many other cases either directly or indirectly, recognized slaves

⁹³ 16 Peters' Reports, 539.

⁹⁵ 12 Wheaton's Reports, 568.

⁹⁴ 5 Howard's Reports, 215.

as property. Fifteen years before the Dred Scott case Mr. Webster, arguing Groves vs. Slaughter, said,⁹⁶ "The Constitution of the United States recognizes slaves as property—the protection of this right of property in the intercourse between the states became a duty under the Constitution." Again "The court are called upon to say that the state of Mississippi may prohibit the transportation into that state of any particular article. The court will be obliged to find out something in the introduction of slaves different from trading in other property. This will be difficult." And still again, "What is the foundation of the right to slaves? There is no law declaring slaves property any more than land. Slaves are property by the term 'slaves.'" In Williamson vs. Daniels,⁹⁷ Chief-Justice Marshall construing a bequest of slaves said, "We think these words convert the estate previously given, into an estate tail; and if so, since *slaves are personal property*, the limitation over is too remote." And in Prigg vs. Pennsylvania⁹⁸ Justice Story says, "Historically it is well known that the object of this clause (of the Constitution governing the return of fugitive slaves) was to secure to the citizens of the slave-holding states the complete *right and title of ownership in their slaves as property.*"⁹⁹

⁹⁶ 15 Peters' Reports, 495.

⁹⁷ 12 Wheaton's Reports, 568.

⁹⁸ 16 Peters' Reports at p. 611. Italics in the quotations from these two cases, the present writer's.

⁹⁹ Whenever the facts called for it the Court had applied the ordi-

If slaves then by the previous decisions of the court were property, the only other assailable ruling in this branch of the case was that the citizens of all the states had the constitutional right to take their property into the territories of the United States. Of course this question had never been directly passed on before by the Supreme Court. The *principle* involved had however been announced and acted on without dissent or criticism in the *Genessee Chief*¹⁰⁰. In writing the opinion of the court in that case upholding the constitutionality of the Act of Congress conferring jurisdiction on the Federal courts in certain classes of cases arising on the Great Lakes, Taney said:¹⁰¹

nary rules of law governing property, to slaves. Thus in *Brent vs. Chapman*, 5 Cranch, 358, it was held that title might be acquired to a slave by adverse possession. The rule that the offspring of slaves belonged to the owner of the mother was applied in *Williamson vs. Daniel*, 12 Wheaton, 568, and *Fowler vs. Merrill*, 11 Howard, 375, Justice Woodbury citing as authority the rule stated by Blackstone governing the offspring of animals. The ordinary rules governing the conduct of mortgagees of property, was applied to a mortgagee of slaves in *Bennett vs. Butterworth*, 12 Howard, 367. Slaves were held incapable of entering into contracts, even the contract of marriage in *Hall vs. United States*, 92 United States, 27. In cases concerning manumission the ordinary rules of property could not be applied, for the very question involved in these cases was whether the status of slavery existed or not.

That acts against slaves such as assaulting them and killing them were punishable is no evidence that slaves were not property; wanton injuries to domestic animals have always been punished by the common law and the old English law of *deodand* is founded on the idea of *culpa in a chattel*.

¹⁰⁰ 12 Howard's Reports, 443.

¹⁰¹ 12 Howard's Reports, 454.

Again. The union is formed upon the basis of equal rights among all the states. Courts of admiralty have been found necessary in all commercial countries, not only for the safety and convenience of commerce, and the speedy decision of controversies, whose delay would often be ruin, but also to administer the laws of nations in a season of war, and to determine the validity of captures, and questions of prize or no prize in a judicial proceeding. And it would be contrary to the first principles on which the Union was formed to confine these rights to the states bordering on the Atlantic, and to the tide-water rivers connected with it, and to deny them to the citizens who border on the lakes, and the great navigable streams which flow through the western states. Certainly such was not the intention of the framers of the Constitution; and if such be the construction finally given to it by this court, it must necessarily produce great *public inconvenience*, and at the same time *fail to accomplish one of the great objects of the framers of the Constitution,—that is, a perfect equality in the rights and the privileges of the citizens of the different states*; not only in the laws of the general government but in the mode of administering them. That equality does not exist, if the commerce on the lakes and on the navigable waters of the West are denied the benefits of the same courts and the same jurisdiction for its protection which the Constitution concedes to the states bordering on the Atlantic.

Would that equality have existed if the New Englander could take his property into the territories, and the Southerner be debarred from taking his? As a writer in the North American Review, speaking of the Dred Scott case, says:¹⁰²

It is not strange that he [Taney] refused to abandon the views of Constitutional law which he had spent his life in learning and expounding, for the purpose of adopting new interpretations which

¹⁰² Vol. 116, 198.

had gained currency in the heat of party strife among men who had ceased to venerate a Constitution which they had always heard invoked to protect slavery.

Even Von Holst, the bitterest assailant of the Dred Scott case says:¹⁰³

If this was correct [that slaves were property], it would certainly be hard to justify the exclusion of slavery from the territories, for it could hardly be seriously maintained that the "power to make all needful rules and regulations" could be made to include the prescribing to citizens what species of property they might take with them into the territories.

It is not strange that certain politicians of that time sought by every means, fair and foul, to heap obloquy on the judges who thus expounded the Constitution. What they wanted was not an exposition of the Constitution, but a declaration inimical to slavery. They had years before this denounced the Constitution, and made their appeal to the "higher law," and the Supreme Court of the United States refusing to abrogate the Constitution, and there being no lawfully constituted court to expound this "higher law," they had with characteristic modesty constituted them-

¹⁰³ Constitutional History of the United States, vol. III, 310, Von Holst admits that the Supreme Court had twice pronounced, in *Prigg vs. Pennsylvania* and *Jones vs. Van Zandt*, that the constitution recognized slaves as property, and says, "although in the first case the judgment of the Court was delivered by Story, who certainly cannot be taxed with excessive partiality for the South, and whose authority as a jurist cannot easily be impugned, I feel justified in declaring most distinctly that this proposition is absolutely without foundation." One is free to choose enlightenment on a point of law between Marshall and Story, on the one hand, and Von Holst on the other.

selves such a court, from whose *dictum* there was no appeal.

The same judicial calmness of expression marks the language of the Chief-Justice in this case as in his other opinions, and in this he appears in pleasing contrast to some of his colleagues. Mr. Justice Daniel finds evident pleasure in pointing out that the presence of slavery was largely due to the traffic in negroes carried on by the New England States, and Mr. Justice McLean puts aside his Federal robes and identifies himself with a section by such terms as "our Southern brethren," a kinship commonly claimed when we contemplate slipping a knife between the said brethren's ribs. It is unfortunate for Taney's reputation in certain sections of our country that from the beginning to the end of his judicial life, the slavery question should have been the paramount political issue, and that he was so frequently called upon to pronounce upon some phase of it. It has been "Africa in her matted hair obscured" that has been the cause not only of all the misunderstanding and bitterness between the sections of our common country, but that has prevented a just appreciation of many of our greatest men. Webster and Calhoun, Taney and Curtis are names to conjure with in one place and to be objurgated in another. Even Lincoln and Lee have not yet come into their own. From the earliest history of the United States this Sphinx has stood in her pathway with its eternal question, and the riddle is not yet answered. The

framers of the Constitution thought to answer it by various provisions in that instrument; the statesmen of the next generation sought its solution in the Missouri Compromise. Taney and his fellow justices thought that to hold that law void was the answer; finally came the fanatic who in that time of grace discovered a conscience which pricked him sorely about other men's sins, and who saw no peace save in war. Then for four years men saw red. Later the Sphinx was put on a pedestal and garlands hung around its neck. Now the garlands are withering, many men are slipping theirs away surreptitiously, denying that they ever put them there, and still the Sphinx sits unsmiling, and the riddle is unsolved.

Two years after the decision of *Dred Scott vs. Sandford* there came before the Supreme Court the case of *Ableman vs. Booth*, and *United States vs. Booth*.¹⁰⁴ If the questions raised in the former case were of more immediate political consequence, the principle involved in the latter case were of more far reaching importance; for the *Dred Scott* case involved only the rights of the states and citizens of states in relation to slaves; while these cases involved the power of the states through their courts over both Congress and the courts of the Federal government.

As if to show that the doctrine of States' Rights was not the exclusive possession of any one section, this supreme expression of it came from Wisconsin.

¹⁰⁴ 21 Howard's Reports, 506.

The two cases were considered together as they involved the same principles.

The facts in Booth vs. United States were briefly as follows: The grand jury for the Federal District of Wisconsin found a bill of indictment against Booth for aiding in the escape of a fugitive slave from the custody of a United States marshal. Booth was tried in the District Court of the United States and was found guilty. Motions for a new trial and in arrest of judgment were overruled and he was sentenced to be imprisoned for one month and to pay a fine of one thousand dollars and the costs. Four days later the Supreme Court of the State granted two writs of *habeas corpus*, one to the marshal, and one to the sheriff. Returns were made to these writs stating the sentence of the District Court of the United States as authority for Booth's detention. On the hearing the Supreme Court of the State declared the imprisonment was illegal, and ordered Booth discharged, and he was accordingly set at liberty. On the petition of the Attorney-General of the United States a writ of error was issued by the Supreme Court of the United States. No return was made to this writ, and later the Attorney-General filed affidavits showing that the Supreme Court of the State had directed its clerk to make no return to the writ and to enter no order upon the records of the court concerning the same. Finally, the State court still refusing to make any return, the Attorney-General filed a copy of the record of the

State court, and the Supreme Court of the United States ordered such record to be entered on the docket to have the same legal position as if returned by the clerk.

Chief-Judge Taney pronounced the opinion of the court and stated the issue with his usual clearness. He says:¹⁰⁵ "The supremacy of the state courts over those of the United States, in cases arising under the Constitution and laws of the United States, is now for the first time asserted and acted upon in the Supreme Court of a state."

He then proceeds to uphold with no uncertain voice the paramountcy of the Federal over the State courts in matters within the jurisdiction of the former, and to demonstrate the illegality of the action of the Supreme Court of Wisconsin both under the Constitution of the United States and under the laws of Wisconsin itself. Wirt once said of Taney that he was "a man of moon-light mind; the moon-light of the Arctics with all the light of day without its glare." His opinion in this case justifies Wirt's characterization; the light of his reason plays over every part of the subject until the whole stands revealed and illumined.

The last important case decided by Taney was *Ex Parte Merriman*,¹⁰⁶ known as the Habeas Corpus Case. On the 25th of May, 1861, Merriman, a citizen of Maryland, was arrested by a military force

¹⁰⁵ 21 Howard's Reports, 514.

¹⁰⁶ 1 Campbell's Reports, 246.

acting under orders from a Major-General of the United States army, and was committed to the custody of General Cadwalader commanding at Fort Henry in the district of Maryland. On the next day a writ of habeas corpus was issued upon the petition of Merriman by Taney, directing the commandant of the fort to produce the body of Merriman before the Chief-Justice the following day. The writ was returned "served," but the commandant refused to produce the prisoner on the ground that the prisoner had been arrested by the Major-General upon a charge of treason, and that he, the officer holding the prisoner, was duly authorized by the President of the United States to suspend the writ of habeas corpus in such cases. Taney immediately ordered that an attachment issue against General Cadwalader for a contempt in refusing to produce the body of Merriman, the ground of the attachment being that on the face of the return the detention was unlawful, as the President could not suspend the writ of habeas corpus. The attachment issued, but the marshal returned that he had proceeded to Fort Henry for the purpose of serving the said writ, that he sent in his name at the gate, that the messenger returned with the reply that there was no answer, and that he could not serve the writ as he was commanded because he was not permitted to enter the gate. The Chief-Justice excused the marshal from failing to summon the *posse comitatus* to aid him in bringing the officer before the court, as the power refusing obedience was

notoriously superior to any the marshal could command. Two days later Taney filed an opinion in the office of the clerk of the Circuit Court. He says he understands that the President not only claims the right to suspend the writ of habeas corpus at his discretion, but to delegate that discretionary power to a military officer, and to leave it to him to determine whether or not he will obey judicial process, and this without official notice by proclamation or otherwise.

The Constitution providing merely that in certain exigencies the privilege of the writ of habeas corpus might be suspended, but not specifying in which department of the government the power to suspend it should reside, it was necessary in order to determine the repository of the power to ascertain the intention of the framers of the Constitution in regard to it. Taney points out that the clause in the Constitution which authorizes the suspension of the writ is found in the 9th section of the first Article, and that this article is devoted to the legislative department of the government and has not the slightest reference to the executive department; that the second Article, the one that provides for the organization of the executive department, and enumerates its duties, contains no word that can furnish the slightest ground to justify the power of suspension. He points out how carefully the President's powers are delineated in that Article, and how carefully the framers withheld from the President many of the powers belonging to the executive branch of the English government.

He shows that no power in England except Parliament can suspend the writ there, and adds:

If the President of the United States may suspend the writ, then the Constitution of the United States has conferred upon him more regal and absolute power over the liberty of the citizen than the people of England have thought it safe to entrust to the Crown, a power — which could not have been lawfully exercised by the sovereign even in the reign of Charles First. . . . No one can believe that in framing a government intended to guard still more efficiently the rights and liberties of the citizen against executive encroachment and oppression, they (the framers) would have conferred on the president a power which the history of England had proved to be dangerous and oppressive in the hands of the Crown, and which the people of England had compelled it to surrender after a long and obstinate struggle on the part of the English Executive to usurp and retain it.

He next quotes from Story's *Commentaries* to show the opinion of that eminent judge that the power to suspend the writ was lodged in Congress, and from Chief-Justice Marshall to the same effect. He also cites the fact that in the Aaron Burr conspiracy Jefferson claimed no authority to suspend the writ, but communicated his opinion that the writ should be suspended, together with the proofs in the case, to Congress in order that Congress might exercise its discretion on the subject.

Taney's action in this case was worthy of the best traditions of the Anglo-Saxon judiciary. There is no sublimer picture in our history than this of the aged Chief-Justice—the fires of Civil War kindling around him, the President usurping the powers of

Congress, and Congress itself a seething furnace of sectional animosities—serene and unafeard, while for the third time in his career the storm of partisan fury broke over his devoted head, interposing the shield of the law in the defense of the liberty of the citizen. Chief-Judge Coke when the question was put to him by the King as to what he would do in a case where the King believed his prerogative concerned, made the answer which has become immortal, "When the case happens, I shall do that which shall be fit for a judge to do." Chief-Judge Taney when presented with a case of presidential prerogative did that which was fit for a judge to do. In his action there was no hate, no haste, only the passionless vindication of the majesty of the law. With unerring hand he balanced evenly the scales of justice, and when the naked sword of the soldier dashed the balances from his hand, realizing that the law could not be vindicated by an appeal to carnal weapons in this unequal strife in which the bandages had been torn from the eyes of justice to bind her hands, with the dignity worthy of his high office and blameless life, he answers thus the challenge:

I have exercised all the power which the Constitution and laws confer on me, but that power has been resisted by a force too strong for me to overcome. It is possible that the officer may have misunderstood his instructions and exceeded the authority intended to be given to him. I shall, therefore, order all the proceedings in this case, with my opinion, to be filed and recorded in the Circuit Court of the United States for the district of Maryland, and direct the clerk to transmit a copy under

seal, to the President of the United States. It will then remain for that high officer, in fulfilment of his Constitutional obligations to "take care that the laws be faithfully executed" to determine what measures he will take to cause the civil process of the United States to be respected and enforced.

Thus did Taney two hundred years later pay the debt due Democracy by his ancestor the Bishop of St. David's, that zealous upholder of Royal prerogative. No sooner was Taney's opinion in this case published than divers little men thinking to bulk larger by throwing their shadows athwart that of the Chief-Justice, fell over each other rushing to the attack on the venerable judge in speeches and in pamphlets. Some indeed have reached to immortality by thus happily linking their names with that of the immortal judge. Men of very different character made serious and scholarly attempts to refute the arguments of Taney and to prove that the President has the right under the Constitution to suspend the privilege of the writ of habeas corpus. Of these attempts the strongest was made by Mr. Binney of the Philadelphia Bar. Mr. Binney grounds the right of the President in his duty to "take care that the laws be faithfully executed." Mr. Binney was answered by Mr. J. C. Bullit, Mr. Edward Ingersoll, and Judge Nichols. Chief-Justice Joel Parker of New Hampshire, also delivered a lecture afterwards published in the North American Review for October, 1861, in which he claims that the existence of martial law was *ipso facto* a suspension of the

writ. This, however, is denied by Mr. Binney who considers this doctrine more dangerous than a denial of all power of suspension without the express authority of Congress. Soon after this Congress passed an Act authorizing the president to suspend the privilege of the writ of habeas corpus whenever in his judgment the public safety required during the continuance of war, but limited this authority in important respects.¹⁰⁷

Of a keenly sensitive nature, Taney felt acutely the partisan attacks made on him from time to time, both while he was in the cabinet and while on the bench. As a private citizen he did not hesitate, as has been shown, to take up the cudgels even with so doughty an opponent as Webster; but after his elevation to the bench, he preferred to suffer detraction in silence rather than defend himself in speech or in print.

Not only was his regard for the dignity of the court over which he presided great, but his appreciation of the courtesy due from one department of the government to another was most delicate. When, as before mentioned, Seward asked leave to dedicate to him a speech, the former had made in the Senate, as a means of influencing the House in its favor, Taney declined the honor, saying he was unwilling to have his name in any way connected with a measure pending before the Legislative or Executive Departments. "I have adopted this course," he says, "from the be-

¹⁰⁷ See *Ex Parte Milligan*, 71 United States, p. 133.

lief that it would enable me to discharge my judicial duties more usefully to the public."

Another illustration of Taney's appreciation of obligation of his high office is related by his biographer.¹⁰⁸ His body-servant, Madison, was drafted during the war as a soldier for the Federal Army. He had served Taney so long that in the extreme old age of the Chief-Justice he had become indispensable to him. It was well known both to Taney and to the family physician that Madison had organic heart disease which disqualified him for army service. The physician proposed to make an affidavit to that effect and have Madison excused, but Taney refused to allow it and paid for a substitute for Madison instead.

The beauty of Taney's home life cannot be shown better than by transcribing the following letter:¹⁰⁹

WASHINGTON, January 7th, 1852.

I cannot, my dearest wife, suffer the 7th of January to pass without renewing to you the pledges of love which I made to you on the 7th of January forty-six years ago. And although I am sensible that in that long period I have done many things that I ought not to have done, and left undone many things that I ought to have done, yet in constant affection to you I have never wavered, never being insensible how much I owe to you, and now pledge to you again a love as true and sincere as that I offered on the 7th of January, 1806, and shall ever be

Your affectionate husband,

B. TANEY.

¹⁰⁸ Memoir, Tyler, 482.

¹⁰⁹ Memoir, Tyler, 316.

Lack of space forbids us to more than touch on the private life of the Chief-Judge. His courage in the performance of his official duty as evinced in his calm defiance of the most powerful leaders in Congress in the matter of the United States Bank, of the Executive in *Ex parte Merriman*, and of a political party in the Dred Scott case, was well matched by the courtesy, kindness, and high breeding that informed his daily intercourse with his friends and those with whom he came into contact in his official life. Simplicity of life and a sweet reasonableness of character was joined in him to an affectionate disposition, a keen appreciation of the love of friends and family, and a high sense of the obligations that friendship and the ties of kinship impose.

Born in a feudal society, he not only felt the responsibility of the representative slave owner to care for those dependent on him, but even after manumitting his inherited slaves, the only ones he ever owned, he supported the older ones among them until their death; and having had his likeness made, on request, to be presented to two of the justices of the Court of Queen's Bench, he had two more struck off from the same negative, and presented them to two old negro servants, with the inscription, "As a mark of my esteem."

Among the many stories showing his kindness of heart, it is related of him that hurrying one very cold morning to his office, at an early hour, he saw a little negro girl trying vainly to pump water into a tin

bucket. Seeing the plight of the child, he filled the bucket, placed it upon her head, and said, "Tell whoever sent you to the pump that it is too cold a morning to send out such a little girl." Nor was the Chief-Justice of the United States too great to stand at the outer door of the confessional, in a crowd of negro penitents, to wait his turn for admission, and this while he was being represented as holding that negroes had no rights that a white man was bound to respect.

And thus he bore without abuse
The grand old name of gentleman.

A member of the Roman Catholic communion, he was deeply religious, and was scrupulous in the performance of the duties enjoined by his church.

Chief-Justice Taney died on the 12th of October, 1864, in the eighty-eighth year of his age, and was buried, as was his wish, in Frederick City, by the side of the mother he loved so well in life.

HORACE BINNEY.

HORACE BINNEY

From a painting by Thomas Sully, executed in 1833, in possession
of the Law Association of Philadelphia.



HORACE BINNEY.

1780—1875.

BY

CHARLES CHAUNCEY BINNEY,

of the Pennsylvania Bar.

HORACE BINNEY, son of Barnabas and Mary (Woodrow) Binney, was born in Philadelphia on January 4th, 1780. The period in which he grew to manhood was one of progress and development, of bright hopes and high ideals. The people of the thirteen colonies had been fused into a single nation, united and independent, and the formative stage of its existence was not yet past. The framers of the Constitution still guided the helm of state, enthusiastic in their work and feeling personally responsible for its success; an enthusiasm and a responsibility which they communicated to the younger men who were growing up about them, and who, to quote Mr. Binney's own words, "were told to take a star for their guide, and the sky was clear in their youth, and they saw the star and followed it." From his father, a native of Boston, and a surgeon of repute in the American army, the boy undoubtedly heard something of the struggle for independence, and also of the need of a strong national

government to preserve the fruits of a contest that had cost so many precious lives, among which that of Dr. Binney himself was soon to be numbered, for his premature death in June, 1787, was directly traceable to the hardships of his service in the field. When, on July 4th, 1788, the boy marched with his schoolmates in the Federal procession, to celebrate the adoption of the Constitution by the requisite number of States, he had even then an inkling of the meaning of the great event, and to his own connection with it he looked back with keen satisfaction to his dying day. "My young heart," he wrote, "then first felt that I had a country, without understanding the full import of the word; but afterwards the feeling carried me on to the true understanding of it." A few years later, when Philadelphia was the seat of the new government, he lived for a time close to the residence of Washington and Hamilton, and the dignified bearing of both men, whom he saw frequently, made a deep impression on his youthful mind. His boyish admiration for both these great neighbors only increased as he grew older, and they were never afterwards separated in his affection and regard.

His mother's marriage to Dr. Marshall Spring, of Watertown, Massachusetts, led to an important change in the boy's life—the removal to Watertown in April, 1792. He was at first sent to a boarding-school near Medford, but the day after his arrival he had a controversy with the principal on a point of

Greek construction, and, rather than adopt the latter's view, he walked out of the school and found his way back to Dr. Spring's. He was then placed in charge of a clergyman near Cambridge, where he lived happily for a year; and between riding horses to plough, cutting his fingers with the sickle, digging potatoes, fishing and skating, he made out to grow old enough to go to college. In point of fact, as to studies, he could have entered Harvard when he left Philadelphia, but was under the prescribed age. From his Harvard days may be dated that habit of systematic study which contributed so greatly to his professional success, and became so characteristic of him. Its acquisition cannot be traced to any one outside influence, though his mother's death in November, 1793, after a period of illness when he was much with her, must have tended to develop the serious side of his nature. He had always done well at school, and had apparently always been encouraged to do well, and with the opportunity for deeper study came the desire and the habit, although the mechanical methods of teaching then in vogue could not of themselves arouse much intellectual enthusiasm. That he graduated with marked distinction¹ in 1797 is of relatively little importance compared with the fact of his realization, while still so young, that the college course of the

¹ Daniel Appleton White, afterwards Judge of the Probate Court for Essex County, Massachusetts, stood first, but Binney's position was so nearly equal as to be recognized officially as better than the second place.

day covered but a very small field, and that a thorough education could be attained only by voluntary work outside the regular curriculum and beyond the usual hours of study.

Though the oratory of such men as Parsons and Dexter had drawn him at times to the court-houses of Boston and Cambridge, he had at first no special inclination toward the bar; and it was mainly the absence of a vacant desk in a Philadelphia mercantile house, after his return there in 1797, which led to his reading law in the office of Jared Ingersoll. The choice once made, however, he devoted himself absolutely to his work, and he undoubtedly had his own experience in mind, as well as that of Edward Tilghman, when, sixty years later, he wrote the following words:

There are two very different methods of acquiring a knowledge of the law of England, and by each of them men have succeeded in public estimation to an almost equal extent. One of them, which may be called the old way, is a methodical study of the general system of law, and of its grounds and reasons, beginning with the fundamental law of estates and tenures, and pursuing the derivative branches in logical succession, and the collateral subjects in due order, by which the student acquires a knowledge of principles that rule in all departments of the science, and learns to feel, as much as to know, what is in harmony with the system, and what is not. The other is to get an outline of the system by the aid of commentaries, and to fill it up by the desultory reading of treatises and reports, according to the bent of the student, without much shape or certainty in the knowledge so acquired, until it is given by investigations in the course of practice. A good deal of law may be put together by a facile or

flexible man in the second of these modes, and the public are often satisfied with it; but the profession itself knows the first, by its fruits, to be the most effectual way of making a great lawyer.

There can be no question as to the method which Mr. Binney himself pursued, but while it led to ultimate success, it could not at the start make up for the total lack of friends who could give him any professional opening. He was admitted to the bar in March, 1800, but, to quote his own words, "for six years after my admission my porridge would have been very insipid if I had had to buy my salt with what I had made at the bar." Difficulty only spurred him to greater exertion, however. By constant attendance at court he became well versed in procedure, and he supplemented this knowledge by unremitting study, his office light rarely failing to be visible up to a late hour. "Absolute business does not chain me to Philadelphia, 'tis true," he wrote when a trip to New England was suggested, "and I might leave without material detriment at the moment, but a young man's passage here is uphill. I have very many before, and some few behind me, but this latter number must not be diminished. They will take my place if I run to gather flowers on the mountain's side, or rest one moment from my upward path."

He was not, indeed, wholly alone in his disheartening experiences during these first years. There were enough others in like case to meet one day in

his office and discuss the plan of abandoning the law and forming a settlement in the back woods of Luzerne County. And yet, all this time, he was surely laying the foundations of his future success. His talents and agreeable manners early won him the friendship of several of the leading lawyers and judges and other eminent men of the city, and when, in 1806, a fusion of Federalists and Independent Democrats made possible his election to the Legislature, his name led all the rest.

Mr. Binney's able and conscientious work during the session served to make him still better known, and after its close, he found his practice rapidly increasing. At that day Philadelphia was the commercial metropolis, whose vessels were found in every sea, and it was fortunate for Mr. Binney that *Gibson vs. Philadelphia Insurance Company*,² the first important case which he won, involved a point of marine insurance law, for such cases were especially frequent. Both France and England attacked American commerce, and as both powers sought to justify their depredations by novel and ingenious applications of first one, and then another, legal doctrine, the conflicting rights of insurers and owners were constantly before the courts, and a reputation as an insurance lawyer was particularly valuable.

The law of marine insurance had, in fact, its great development at this time, both in England and in America, being built up mainly by applying or dis-

² *I* Binney's Reports, 405.

tinguishing the doctrines laid down by continental writers. The previous English authorities were few, and Mr. Binney's arguments (for he was concerned in many of the most important cases) contributed to the settlement of several disputed questions in regard to abandonment,³ deviation,⁴ seizure for prohibited trade,⁵ freight pro rata,⁶ acceptance of goods before reaching destination,⁷ and other matters, and they have always interested the members of the profession even in the cases which he failed to win.

In 1808 he wrote the first of his six volumes of Reports, which are generally conceded to be unsurpassed of their kind. Careful, even elaborate, reporting was peculiarly desirable at that time, as the English reports were comparatively few, and American authorities still more rare, so that every new decision was far more of an addition to the stock of precedents than is ordinarily now the case. The court designated the cases to be reported, and Mr. Binney's view was that if a case was worth reporting at all, it was worth a thorough report, which

³ Savage vs. Pleasants, 5 Binney's Reports, 403; Krumbhaar vs. Marine Insurance Company, 1 Sergeant & Rawle's Reports, 281; Ritchie vs. United States Insurance Company, 5 Sergeant & Rawle's Reports, 501.

⁴ Duerhagen vs. United States Insurance Company, 2 Sergeant & Rawle's Reports, 309.

⁵ Faudel vs. Phoenix Insurance Company, 4 Sergeant & Rawle's Reports, 29.

⁶ Callender vs. Insurance Company of North America, 5 Binney's Reports, 52.

⁷ Low vs. Davy, 5 Binney's Reports, 595.

should show the arguments presented to the court, and not merely the opinions ultimately delivered.

While for over twenty-five years he was constantly before the courts, the only conspicuously great case with which his name is associated, the Girard Will case, belongs to the period after his practical retirement. Still, it may be worth while to refer to a few others in further illustration of his connection with the development of American law.

Munns vs. Dupont⁸ is well known as containing Mr. Justice Washington's admirable definition of probable cause in criminal proceedings, viz., "a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offence with which he is charged." The defendants in this case of malicious prosecution were the celebrated powder manufacturers at Wilmington, whose trade secrets Munns had attempted to learn by enticing away their workmen and inducing them to take with them some articles used in the manufacture. In their criminal proceedings, which ultimately broke down, it cannot be said that the Duponts had shown any particular regard for Munns' comfort or even for his possible legal rights, but their feelings of exasperation were undoubtedly natural, and Mr. Binney, who represented them in the suit brought by Munns, succeeded in showing

⁸ 3 Washington's Circuit Court Reports, 31; American Leading Cases, vol. 1, 200, argued in 1811.

that they had had good cause for belief in Munns' guilt, even though they had been unable to prove it.

The case of *Lyle vs. Richards*⁹ settled the title to what is now an important section of Philadelphia, but belongs at the present day rather to the realm of legal history than to that of existing law. It involved the validity of a common recovery which Mr. Binney had himself conducted in 1814, the question being whether the common law in regard to real property had been so far transmitted to Pennsylvania as to give to that peculiar proceeding the same effect in barring contingent remainders that it had in England. Common recoveries have long since passed away, but the principle was then, as Chief-Justice Tilghman, said, "of great and general concern," and no lawyer who loves his profession for its glorious past can fail to realize that the law is the richer for that case. The report does not indicate by what reasoning Mr. Binney sustained his position, but as the Chief-Justice referred to the "very able argument, in which everything that could be said, on either side, was brought forward," and as the court was not wholly unanimous, the controlling opinion is presumably on the lines of the argument which prevailed.

*Conrad vs. Atlantic Insurance Company*¹⁰ has frequently been cited on several points of insurance and commercial law. The principal point,—viz.,

⁹ Sergeant & Rawle's Reports, 332; argued in 1823.

¹⁰ Peters' Reports, 386; argued in 1828.

that a transfer of bills of lading as security for a loan passes a valid title as against all the world, if the loan be made *bona fide* and without notice of any adverse interest,—Mr. Binney thought so clear that no appeal ought to have been taken; but this fact did not prevent his making a most careful argument, discussing the maritime law of loans from the days of Justinian down. In this case he was associated with Webster, over whom sixteen years later his greatest victory was won.

In *Bank of the United States vs. Donnally*,¹¹ another much-cited case, Mr. Binney successfully contended that the question of liability on a note must be determined by the *lex fori* without regard to the law of the state where the note was made.

*Ingersoll vs. Sergeant*¹² is not merely a part of the hornbook law of the Pennsylvania student, but is a peculiar example of the law's delay, six years having elapsed between the argument in 1830 and the reargument in 1836. The case was one of replevin for arrears of ground-rent, and it was contended that a release of a part of the ground from the payment of the rent extinguished the rent altogether, although the deed undertook to reserve all the releasor's rights as regards the rest of the ground. The court, however, sustained the argument that a ground-rent in Pennsylvania was not an English rent-charge, but was apportionable, so that the re-

¹¹ 8 Peters' Reports, 361; argued in 1834.

¹² 1 Wharton's Reports, 337.

lease extinguished only so much of the rent as was proportionate to the value of the land released. In delivering the opinion of the court, Judge Kennedy took the position that a ground-rent was a rent-service as at common law, and that the statute *Quia emptores* had never been in force in Pennsylvania at all. This doctrine has been the subject of much criticism, and it is significant that Mr. Binney seems to have confined himself to the view that a ground-rent was "in character analogous to a rent-service, . . . and ought to be governed by the rules applicable to that species of rent."

By 1815 he had become recognized as a leader in his profession, and on Chief-Judge Tilghman's death, in 1827, the bar of Philadelphia, almost to a man, requested Mr. Binney's appointment to the vacant seat, while on Judge Washington's death, two years later, a similar request was made to President Jackson. Both requests were fruitless, as Mr. Binney's well-known Federalism was not in favor with either Governor or President. The Governor did indeed offer a commission as puisne justice, and his successor repeated the offer some years later, with a better grace, but both offers were declined. Still later, in 1844, a seat on the bench of the Supreme Court of the United States was undoubtedly within Mr. Binney's reach, but he had no wish to be a judge, save as a means of performing his duty to the community, and then only if the call were imperative. He never concerned himself in the least with

the applications in his behalf, and while he would willingly have served as a puisne justice under a Tilghman or a Marshall, he was too little in sympathy with the successors of those eminent jurists to feel that a call to sit with them on the bench was one which must needs be accepted.

After twenty-five busy years Mr. Binney began to weary of court practice, partly from the strain on his health, partly because the judges of the day seemed to him inferior to their predecessors, partly, too, because the death of his oldest daughter lessened his interest in the activities of life. Accordingly the election of 1832 found him ready for a change, and he accepted a nomination for Congress. The intensely personal character of President Jackson's policy—his exclusion from office of all who declined to adopt that particular stripe of democracy which he represented, and to accept him as their leader—furnished the great issue of the day, and in Philadelphia especially this issue was intensified by the veto of the bill to renew the charter of the United States Bank. To a man of Mr. Binney's strong Federalist principles and conservative financial views, Jackson was about as unacceptable a President as could well be imagined, and the veto he regarded as a reckless attempt to destroy the one reliable guarantee of the stability of the currency. Only the most complete ignorance of finance and the blindest partisan prejudice could, to his thinking, have made such a veto possible. He made his

canvass as an anti-Jackson candidate pure and simple, wholly independent of party affiliations, for though supported by the Whig party (then beginning to take definite shape), he was not a member of it, and he was perfectly outspoken in avowing his opposition to protection, which had by that time become popular in Philadelphia. In spite of, or possibly because of, this independence, he led his Whig colleague by over three hundred votes. Before Congress met, the President made his next move against the Bank, by directing the removal of the government deposits, and as the President's followers and opponents were very evenly divided, the deposit question occupied the greater part of the first session. Mr. Binney spoke upon it several times, and his three days' speech of January, 1834, when he discussed the whole situation most fully, was regarded as probably the greatest forensic effort of that Congress.

The controlling thought in the whole speech is crystallized in the closing words—that “the spirit of party is a more deadly foe to free institutions than the spirit of despotism,” and though Mr. Binney attacked most outspokenly the course which the Administration had pursued toward the bank, he did not speak as a partisan, but appealed to reason and patriotism alone, avoiding all invective or abuse. The stubborn Jackson was in no way moved by the argument, but at least he appreciated its chivalrous courtesy, and as soon as the speech was ended he in-

vited Mr. Binney to dine, receiving him as the guest of honor, to the great surprise of the average politician.

On February 14th the debate ended and the Jackson party won by the slender majority of four. A second prolonged debate occurred over the reports of the Committee of Ways and Means. Mr. Binney had written the minority report, and did not despair of its adoption as long as the bank adhered to its course of reducing discounts and curtailing circulation, preparatory to closing its business; for while sound management demanded the contraction, it tended to cripple all business and to arouse a public demand for the preservation of the bank and a reversal of the President's policy. To Mr. Binney's astonishment and disgust, this wise course was abandoned before the final vote was taken in Congress, and thereafter he ceased to be the bank's champion. It had thrown away its only practical weapon, and he could do nothing more for it. He interested himself in all other important matters, and just before the close of the second session he took his leave of public life in a strong speech on the relations with France, then seeming to drift rapidly toward war. He declared that no sufficient cause of war existed, and counseled calmness and further negotiations. He was listened to with great respect and appreciation, but the rather bellicose resolutions which he opposed were passed, notwithstanding, although in the end they turned out, as

such resolutions often do, to be mere bark, and no bite followed.

In 1836-37 Mr. Binney spent more than a year in Europe, and after his return steadily refused all court practice, though continuing to give opinions on points of law. The only instance in which he resumed the task of an advocate, was, however, the very case with which, more than with any other, his name has ever since been connected, and upon which his national reputation as a lawyer may be said to stand,—the Girard Will case. Stephen Girard, the richest self-made man of his day in America, died without issue in 1831, leaving the bulk of his property to the city of Philadelphia in trust to establish and maintain a college for poor white male orphans, the provisions of the will being modeled on those regulating the management of Heriot's Hospital in Edinburgh. His relatives, dissatisfied with their moderate legacies, filed a bill alleging that the city could not be a trustee, and also that the objects of the charity were too vague and indefinite to sustain a trust. The bill was dismissed, but the United States Supreme Court failed to decide the appeal in 1843, and ordered a reargument, it being currently rumored that the six judges who sat were equally divided. As the city had been in possession of the property for several years, and had already spent a considerable part of it in the erection of buildings, an adverse decision would have involved a very serious liability, and the Councils

naturally felt that no exertion must be spared to prevent such a result. Up to this time Mr. John Sergeant had had sole charge of the defence, Mr. Walter Jones of Washington representing the complainants; but when the latter retained Daniel Webster for the reargument, the city, on its part, turned to Mr. Binney.

Only a very strong sense of duty to his city induced him to break his resolution against appearing again in court. Even as it was, he accepted a retainer only on the express understanding that he was to be associated with his old friend, Mr. Sergeant, and not to supplant him; and fortunately he soon realized that he could strike out a new line of argument for himself without interfering with that previously taken by his colleague. Although the court had said nothing as to the scope of the reargument, it was evident that the case of *Baptist Association vs. Hart's Executors*,¹³ decided in 1819 under the law of Virginia, was the great stumbling-block in the way of an affirmance. In that case, it is true, the devisee, as an unincorporated society, had been held incapable of acting as trustee (a disqualification from which the city was free), but the controlling point in the decision was the view that a trust "for the education of youths of the Baptist denomination, who shall appear promising for the ministry," was one where no legal interest was vested, and that it

¹³ 4 Wheaton's Reports, 1. Judge Story's concurring opinion is found in 3 Peters' Reports, p. 481.

was too vague and indefinite, as regards the *cestuis que trust*, to be claimed by them, so that it could not be upheld by a court of equity, independently of the statute of 43d Elizabeth, which was of no avail in Virginia, having been repealed there before the testator's death. As this statute had never been regarded as in force in Pennsylvania, it could give no validity to Girard's trust, so that to overcome the effect of the decision in the Baptist Association case, and of the opinions with which Chief-Judge Marshall and Judge Story had supported it, involved a thorough study of the law of charitable trusts from the earliest days.

The vital questions to be determined concerned the nature of charitable trusts, as distinguished from all others, and the authority of a court of equity over such trusts, independently of the statute. It is needless to say that Mr. Binney's investigation was of the most searching character, and it has even been often stated that he went to England to look up manuscript records; but as a matter of fact his material was all in print, and accessible in this country, although some of the most important precedents had not been printed until some years after the Baptist Association case was decided.

Mr. Binney's copies of the volumes in which the opinions in the Baptist Association case are found, contain some interesting traces of his work in preparing for the Girard argument. His penciled notes, written after he had completed his researches,

point out again and again the erroneous views of Marshall and Story in regard to the law as it stood before the 43d Elizabeth. It is clear, too, that he thought Marshall's view too narrow, even after making all due allowance for the conditions under which the opinion was written, for the final note is this:

The great defect of this case is that the mind of the Chief-Justice is not applied to the subject upon grounds and principles of general equity, but it is a search after the *fact* whether chancery, before 43d Elizabeth, can be shown to have exercised the power of enforcing trusts for charities that could not be directly enforced at law. This was altogether an unworthy research for such a man.

In December Mr. Justice Thompson died. It was generally understood that he had been in favor of upholding the trust. At all events his death made it possible that the court might divide evenly on the reargument, and while this would have sustained the will, it would not have settled the principle for which Mr. Binney was contending. Had he needed any further stimulus to strive for a victory of the most decisive character, the bare possibility of a divided court might well have furnished it. As it turned out, however, Chief-Justice Taney was too unwell to sit, and the case was ultimately heard by seven judges only, Mr. Justice Story presiding.

On February 2d, 1844, Mr. Jones opened, and on the 5th Mr. Binney proceeded to lay before the court the fruits of his study of the case. He first

showed that Girard had been far from illiberal to his relatives, and that, in consequence of the residuary clauses of the will, they could gain nothing by a judgment adverse to the trust. "The complainants' whole argument against the charity is," he said, "suicidal." The only effect of it, beyond their own destruction, is to give [the property] to the city, for her appropriate municipal uses, and to defeat, without the slightest benefit to themselves, the noble charity that their kinsman has instituted for the poor."

Turning to a consideration of the trust itself, Mr. Binney called attention to the fact that the attack upon Girard's will was an attack upon all charitable trusts in the United States. He said:

This great question, involving the largest pecuniary amount that has perhaps ever depended upon a single judicial decision, and affecting some of the most widely diffused and precious interests, religious, literary, and charitable, of all our communities, is now to be brought to the test of legal researches and reasoning.

. . . If we look to [the complainants' bill] for such discrimination between charitable uses as will leave the public in the enjoyment of some and deprive them only of others, we find nothing of the kind. It would have been some relief to ascertain, if those in the testator's will were thought to be defective, that by adding or subtracting some particular characteristics, we might, with the complainants' consent, fall upon at least one class of charities that has enough of suspended animation to be resuscitated by a court of equity. But the complainants leave no such hope or expectation to the public. They give us no principle or rule by which we can discover that in their judgment there are any redeeming characteristics of a good charitable use. They allege as fatal defects in the uses declared by Mr. Girard proper-

ties that are not only common to all charities, but are inseparable from their very nature. They treat the whole institution of charities as an irremissible offense against the laws of property, whether legal or equitable, except so far, and only so far, as the Legislature may have made a special enactment for the case.

So fundamental an attack could be satisfactorily met only by a recurrence to first principles. In answering the objection that the Girard trust was void because the beneficiaries were not certain, Mr. Binney was not content with showing that a trust for the support and education of poor white male orphans of a certain age was neither vague nor indefinite, but he went on to turn completely the tables upon his antagonists, proving conclusively that uncertainty as to the beneficiaries, so far from detracting from a charitable trust, was an essential feature of it. In developing this part of his argument he first called attention to a number of instances of charitable trusts for uncertain objects, and of the vesting of interests in the beneficiaries, and went on to say:

The argument of the complainants demands for all charities that certainty and definiteness which are the badges of private right; and it probably will not be surrendered until, by rising up to the source of charity, it is shown that certainty in their sense is its bane, that uncertainty, in the sense of the law of charities, is its daily bread, and that the greatest of all solecisms in law, morals, or religion is to talk of charity to individuals personally known to and selected by the giver. There is not, there never was, and there never can be such a thing as charity to the known, except as "unknown." Uncertainty of person, until appointment

or selection, is, in the case of a charitable trust for distribution, a never-failing attendant.

He then proceeded to rise “up to the source of charity,” saying:

It has been said that the law of England derived the doctrine of charitable uses from the Roman civil law. . . . It is by no means clear. It may very well be doubted. It is not worth the time necessary for the investigation. . . . But where did the Roman law get them? . . . They come from that religion to which Constantine was converted, which Valentinian persecuted, and which Justinian more completely established; and from the same religion they would have come to England, and to these States, though the Pandects had still slumbered at Amalfi, or Rome had remained forever trodden down by the barbarians of Scythia and Germany. I say the legal doctrine of pious uses comes from the Bible. I do not say that the principle and duty of charity are not derived from natural religion also. Individuals may have taken it from this source. The law has taken it in all cases from the revealed will of God.

What is a charitable or pious gift, according to that religion? It is whatever is given for the love of God, or for the love of your neighbor, in the catholic and universal sense,—given for these motives, and to these ends,—free from the stain or taint of every consideration that is personal, private, or selfish.

Viewed as a definition, this statement has been criticised as more religious than practical. It is, however, a description of a charitable gift “according to the Christian religion,” from the stand-point of “the source of charity,”—a description, in other words, of the ideal charitable gift, rather than a definition to which all gifts which are to be upheld as charitable must conform. The complainants

had contended that the law would not uphold a trust in favor of indefinite, unknown persons, and Mr. Binney was undertaking to show that the most perfect charitable gift was that where the beneficiaries were least known to the benefactor. It is a mistake to suppose that this description of the ideal charitable gift was intended as a definition. It relates to motives and considerations which may be inferred, but can never be proved to exist, and in regard to which it may be said of any gift that the more nearly it approaches this ideal, the more truly a charity it is.

The argument continued with a discussion of charity from the religious stand-point, a discussion thoroughly spiritual in its tone. Realizing that some explanation might be needed for thus trenching on what might be thought the province of the preacher rather than the lawyer, he said:

It has been by no means my intention in these remarks to pronounce a homily to the court or to the counsel. It is not without some repugnance that I have blended themes of this nature with questions of law, in a strife for the recovery and defence of property. But they bear directly upon questions of law, and especially upon the great question which I am now to discuss; for they disclose the foundation of charitable uses and one of their inseparable attributes, in a manner most effectual to answer not only the main argument of the complainants' counsel, but the judicial arguments which, in one or two cases in our own country, have unfortunately been used to defeat them.

After disposing of the legal objections which had been urged against the trust, Mr. Binney proceeded

to establish its validity, demonstrating, by reference to group after group of unassailable authorities, the successive propositions that the trust was good by the common law of England, which was the common law of Pennsylvania; that the city, being in complete possession, was not seeking the aid of a court of equity; that the trust was, however, entitled to the protection of such a court upon general principles of equity jurisdiction; that such trusts always had been protected in Chancery by its original jurisdiction; that the statute of 43d Elizabeth only supplied an ancillary remedy, long since disused; and that the great body of the equity code of England had been adopted in Pennsylvania from the first, as well as in several other states. In short, he placed the Girard trust upon absolutely impregnable ground.

In the discussion of his first proposition he took up the objection that Girard had sought to found an anti-Christian charity, an objection based on the circumstance that the will provided that "no ecclesiastic, missionary, or minister of any sect whatsoever" should ever set foot, even as a visitor, within the college grounds, which were to be surrounded by a high stone wall. Mr. Binney pointed out that there was no prohibition of religious teaching, but only an exclusion of ecclesiastics, and that expressly because of the multiplicity of sects, the will disclaiming most positively all intention to cast any reflection upon any sect whatever; while, on the other hand, the provision for instruction in "the purest princi-

ples of morality," and the references to "the sacred rights of conscience," and to the adoption of "religious tenets" by the scholars on leaving the college, showed that Girard contemplated that the scholars should be qualified by Christian teaching in the college, to become, after leaving its walls, intelligent and conscientious members of Christian bodies. He said:

Whoever reads this will by its own light only, and this is all that the court have to guide them, must therefore see that there is nothing in it like an interdiction of instruction in the principles of the Christian religion; and I contend for this the more strenuously because the trust, I confidently believe, must be executed, and I should deprecate it as a great public evil, as well as a perversion of the will, to have a doubt remain of either the right or the duty of the trustees to give religious instruction.

In this connection he went on to state that there was no law requiring Christianity to be taught in schools by Christian ministers, that a great deal of religious instruction was given by laymen, as in the case of Sunday-schools, and that there was nothing in the will to prevent the erection of an infirmary outside the walls for the use of the scholars in time of illness, to which building, if so placed, the exclusion would not apply. He added the pertinent suggestion, which did not tend to bring comfort to the heirs:

If this exclusion or restriction in the testator's will is illegal, it is for that reason null and absolutely void, and the consequence is not that the charity fails, but that the restraint—the condi-

tion—is defeated, and the court must establish the charity according to their sense of the law. It is a condition subsequent to the gift. The estate has vested in the trustees, and this restraint or condition is a restraint upon its use. If the restraint is illegal, the use is not bound by it.¹⁴ The complainants gain nothing by the objection but the unenviable satisfaction of holding up their benefactor to judicial censure, and possibly to more general reprehension.

Mr. Binney's most original work in the case—his presentation of authorities some of which had previously been practically unknown, while others had been but imperfectly understood—was in regard to the status of charitable trusts in equity. A dictum of Lord Loughborough in *Attorney-General vs. Bowyer*,¹⁵ for instance, had stated that the tradition in the times immediately following the statute of 43d Elizabeth was that prior to its enactment charitable uses had been supported at law if possible, but had received no aid from Chancery, and this dictum had evidently had some weight in the Baptist Association case. Mr. Binney showed numerous reported cases, decided since the date of the statute, affirming the full jurisdiction of the Court of Chancery over charitable uses *ab origine*, so that he concluded "that it is but a proper respect to the Lord Chancellor to suppose that he has been misreported, by nevertheless one of the most accurate of modern reporters."

¹⁴ Many will doubtless regret that the court did not follow Mr. Binney's suggestion, and simply hold the exclusion clause to be void. No English Court of Equity would probably have sustained such a clause.

¹⁵ 3 Vesey's Reports, 726.

Authorities anterior to the statute were also within his knowledge. The "Calendars of the Proceedings in Chancery in the reign of Queen Elizabeth" (published by the Record Commission in 1827 and of course unknown to the American judges in 1819, when they decided the Baptist Association case), which contained also several examples of still earlier proceedings in that court, furnished more than fifty instances of an exercise of chancery jurisdiction over charitable trusts before the statute of 43d Elizabeth (although Chief-Judge Marshall had positively stated that there was no trace whatever of such a jurisdiction), thus showing that such trusts did not depend upon any statute for their validity.

Here [he said] is a mass of testimony on the fact of Chancery jurisdiction, in cases of charitable uses, before the 43d of Elizabeth, that cannot be resisted. When we advert to the various objects of these bills, we may imagine ourselves to be reading a Chancery calendar of the present day, in which parties, in some cases with no definite or particular interest legal or equitable, ask for the supply of new trustees, for the redress of abuses, for a decree to enforce a charge upon land, or to change the investment of a charity—in behalf of the poor—of schools—of churches—of hospitals—without regard to the statute of Wills, or the statute of Enrolment, or to any other mere legal impediment— injunction bills—bills of revivor—cross bills—the full action of equity in all respects. Charitable uses were, therefore, not left to be made out at law as well as they could be. Chancery assisted them precisely as it now does.

Mr. Sergeant followed with a general review of the grounds of defence presented by Mr. Binney,

and Webster then replied in a three days' speech, directed mainly against the exclusion of the clergy from the college. He contended that the trust was designed to foster atheistic, or what would now be called agnostic, education, and hence was not really a charity at all in any view that a court of equity would uphold. This part of his argument was thought so strong a plea for the necessity of a religious education that it was afterwards published as a pamphlet, on the request of a number of religious people; but as the exclusion clause was, as Mr. Binney had pointed out, in no sense essential to the maintenance of the trust, the argument was more ingenious than pertinent.

The unanimous opinion of the court, delivered by Mr. Justice Story¹⁶ is wholly along the lines of Mr. Binney's argument, and frankly admits that the court had more information on the history of charitable uses than it had had in 1819. The opinion is clear, concise and able,—worthy of the great jurist who wrote it,—and yet it is probable that even to this day, when the Girard Will case is referred to, mention is made of Horace Binney's argument rather than of Story's opinion.

President Tyler's offer of a seat on the Supreme Bench, made privately to Mr. Binney, immediately after the argument, is told in Mr. Henry A. Wise's "Seven Decades of the Union," and Mr. Binney himself left a private record of the interview.

¹⁶ Vidal vs. Girard's Executors, 2 Howard's Reports, 127, 183.

While Mr. Wise's account may be substantially correct, it is safe to say that the statement that Mr. Binney admitted having once "aspired to judicial position," and that his "ambition" had been "cured," is too utterly at variance with his lifelong attitude toward the bench, to warrant any credence whatever.

How the argument impressed one who ultimately became President, is told in a letter of Mr. Binney's to a friend, written thirty years later.

The argument on my part is truly presented, but I have been often told it was better delivered. It may be so, or not so. Upon the strength of having heard it, I really believe that General Taylor wished to make me his Secretary of State, as I was informed semi-officially, which I think was the most foolish thing I ever heard of him, unless perhaps it was his excess in eating cherries and ice-cream, which killed him. But he was a very honest man, though perhaps no better judge of civilians than General Grant is said to be.

After his retirement from court practice, Mr. Binney continued for several years to give opinions upon legal questions. Many of the opinions concern land titles, and the reliance upon them has always been practically as great as upon a modern policy of title insurance; but perhaps the most interesting opinion, all things considered, is one which for a time brought upon him a great deal of abuse, yet ultimately received complete vindication in all respects,—his opinion denying the power of the city of Philadelphia to subscribe to the stock of the Pennsylvania Railroad. Those who see the magni-

tude of that corporation to-day can scarcely believe that it had great difficulty in securing the modest capital of ten million dollars only sixty years ago, and that the city's subscription of one-fourth of this sum was deemed vital to the success of the enterprise. As to its desirability, all were agreed, but several public-spirited citizens doubted whether municipal aid were legal, and they sought Mr. Binney's opinion. He gave it at some length, after a careful examination of the law, and he concluded that the power to borrow money and to raise it by taxation could be exercised only for expenses incident to corporate duties, and not in aid of the business of a private corporation, even though calculated to promote the welfare of the citizens. This opinion, unlike almost every other declaration which he had made in regard to public matters, was not at all well received. The promoters of the scheme were determined that it should be carried through, and after an election had changed the composition of the city councils the subscription was voted. Those who had opposed it were decried as old fogies and obstructionists, and Mr. Binney came in for a large share of such criticism, which he bore with his usual calmness. The following year, however, attention was called to the fact that in an unreported case in 1839, in regard to the borough of Newville, the Supreme Court of the state had held precisely the same view of the limits of municipal power which Mr. Binney had taken in regard to Philadelphia, and it

was admitted that the Philadelphia charter contained nothing to warrant any distinction between the two cases. Had Mr. Binney been able to cite this unreported decision, his opinion would have been recognized as unanswerable, but it is not surprising that he had never chanced to hear of the case. What is astonishing is that one of the very judges who decided it had wholly forgotten it, and had published an opinion in opposition to Mr. Binney's.

The same influences which had secured the subscription secured also a statute retroactively authorizing it, thereby openly conceding that the original subscription was invalid, and that Mr. Binney was right. His vindication did not stop there, however. While his formal opinion had been confined to the question of the city's power, he had made no secret of his conviction that even if the power existed, it would be unwise to exercise it—a view which many found as displeasing as that in regard to the existence of the power itself. In this particular instance no money loss resulted, but other railroads were less successful, and the losses of Philadelphia and other municipalities soon became so great that in 1857 the Constitution was amended so as thereafter to prevent any such subscription from being made, even indirectly. Thus within ten years Mr. Binney's opinion, originally decried, had become embodied in the fundamental law of the state.

Although he continued, even after his complete

retirement from practice, to study legal and other questions from time to time, little of his work came before the public. One exception is his pamphlet on "The Alienigenate of the United States," written in 1853, which was of influence in securing the passage of the Act of February 10, 1855 (now Revised Statutes, Sec. 1993), establishing the citizenship of the foreign-born children of citizens. Another exception is the "Inquiry into the formation of Washington's Farewell Address," published in 1859. Still better known are the three pamphlets on the Habeas Corpus question, which attracted wide attention and led to much controversy.

Though heartily opposed to the Rebellion, he did not wish to see the law silent amid the clash of arms, and when the question of the suspension of the privilege of Habeas Corpus was raised he was anxious that the President should rely simply upon his Constitutional powers, and not assume to act as a military dictator. After careful study, he issued a pamphlet upon the subject in January, 1862, taking the ground that the privilege of the writ being a purely civil privilege, the power of suspension was likewise a civil power, and that although it was intended to aid the suppression of rebellion or the repelling of invasion, it was still entirely distinct from the military power. The act of suspension in any case being necessarily executive, and the Constitution having stated the only conditions under which such an act was permissible, he concluded that there

was no scope for legislative action, and that the Constitution had placed the power in the President's hands.

This pamphlet called forth many replies, mainly from those who had little sympathy with any suppression of the Rebellion, whether by Congress or the President, and who while claiming for the former the power of suspension, apparently did so in the hope that that body would not have resolution enough to exercise it. They were far from unanimous as to the precise Constitutional source of the power which they claimed for Congress, and after Mr. Binney's rejoinder in a second pamphlet in April, 1862, they practically abandoned the contest. Neither the President nor Congress, however, completely adopted Mr. Binney's views, the former, in his proclamation of September 24, 1862, undertaking to suspend the privilege of Habeas Corpus in the case of military arrests for acts not strictly treasonable, while the latter, by the act of March 3, 1863, undertook to confer the power upon the President with certain regulations of its exercise. While not approving the course of either, Mr. Binney thought it more patriotic to let the matter drop for the time, but early in 1865, when, in view of the imminent collapse of the Rebellion, the national temper had somewhat calmed down, he completed a third pamphlet on the nature and extent of the power of suspension of the privilege, considered generally, in the light of the records and authorities in regard to

such suspension in England, showing that the proper limitations of the power, in the interest of liberty, could be maintained only by vesting it in the President.

The three pamphlets, while by no means commanding universal assent, remain to this day the leading treatise on the subject. As a clear, carefully reasoned argument, the third pamphlet in particular probably equals anything which Mr. Binney ever produced, but the work of writing it was severe for a man of eighty-five, and with the completion of the task, undertaken as a patriotic duty, his career as a lawyer may be said to have fittingly closed.

Among the services which Mr. Binney rendered his profession in his later years was the rescuing from oblivion the names of those who had won great distinction at the Bar of Philadelphia in his youth, but whom their contemporaries had failed to honor with any lasting memorial. The "Leaders of the Old Bar," published in 1858, portrays in pleasing style the careers of William Lewis, Edward Tilghman and Jared Ingersoll. The writer's own reminiscences form no small part of the sketches, which bring out very clearly not only the traits of the three men themselves, but also the great difference between the practice of law in their time and at the present day. In fact a leading motive for his writing the book was to show the value of judicial tenure during good behavior (a matter which will be referred to below) especially as to the influence of a

truly independent judiciary in maintaining a high standard of character among those who practice before them.

Similarly in the eulogy upon Tilghman, delivered in 1827, and in that upon Marshall, in 1835, he had sought to illustrate, by the man of whom he spoke, some great principle for which that man stood. Tilghman, as a judge of the purest personal character, as well as of great learning and untiring industry, represented an ideal which was in danger of being disregarded in judicial appointments. In speaking of him, therefore, Mr. Binney, while paying due honor to his great abilities, dwelt particularly upon his personal goodness, his sincere religious faith, his absolute devotion to right. These were what distinguished him from some other judges, who, while they might equal him in learning and intellect, were his inferiors in still higher qualities, and Mr. Binney's effort was to show the moral, and not merely the intellectual, greatness of the man.

In the case of Marshall, Mr. Binney's theme was the Federalist ideal of government, to which Marshall had early devoted himself and which had influenced so many of his great opinions. The eulogy is not concerned with Marshall alone, but was a eulogy of the Constitution as the practical and powerful guarantee of the liberty of the citizen and the stability of the nation. It was an appeal for the Union, whose maintenance was threatened by party strife and the clashing of the interests, real or sup-

posed, of the different sections of the country. Marshall's work was of importance, not so much because he had aided in the development of the law, regarded as a science, as because he had placed the Supreme Court in its true position as the guardian of the Constitution, and thereby of the Union itself. As long as the Union lasted, Marshall's work would survive, but the adverse tendencies were only too visible, and hence the eulogy contains these solemn words:

What were the States before the Union? The hope of their enemies, the fear of their friends, and arrested only by the Constitution from becoming the shame of the world. To what will they return when the Union shall be dissolved? To no better than that from which the Constitution saved them, and probably to much worse. They will return to it with vastly augmented power and lust of domination in some States, and irremediable disparity in others, leading to aggression, to war, and to conquest. They will return to it, not as strangers who have never been allied, but as brethren alienated, embittered, inflamed, and irreconcilably hostile. In brief time their hands may be red with each other's blood, and horror and shame together may then bury liberty in the same grave with the Constitution. The dissolution of the Union will not remedy a single evil, and may cause ten thousand. It is the highest imprudence to threaten it; it is madness to intend it. If the Union we have cannot endure, the dream of the Revolution is over, and we must wake to the certainty that a truly free government is too good for mankind.

To the bar and to the community the character of the judiciary is a matter of the highest moment. The law is of value only in so far as the judges apply it intelligently and justly. Unless so applied, it be-

comes a fearful instrument of oppression and injustice, a greater curse than mere lawless violence, because there can be no legal resistance to a final judgment. Convinced that tenure during good behavior was essential to the independence of the judiciary, Mr. Binney consistently opposed the substitution of short terms of years, a system now prevalent in nearly all the states of the Union. In Pennsylvania the change came in 1838, but not without his urgent protest, published in an address to the people of the state.

Constituted as man is [he asked], will judges in general be as impartial and upright on the trial of a cause when the renewal of their offices depends upon the favor of one of the parties, as they will be when nothing but misconduct can deprive them of their office? If this question must be answered in the negative, then the whole question is answered, for in multitudes of causes, and most important causes too, the appointing power, or those who create and influence it, will be one of the parties in name, in interest, or in feeling. . . . These are the cases in which the interests of justice, the great permanent interest of the public, require that judges should be left to the support of an equal mind and undisturbed nerves, to do their duty without fear or favor, and yet these are the cases in which, if the amendments be adopted, the best judges may feel that their solicitude for a family and their love for their station in society are knocking at their hearts to persuade them to give a judgment that shall be acceptable to the friends who can renew their commission. How many will listen to this appeal we cannot tell. Is it wise to expose any of them to it? One man in a thousand may come out of such a fire like refined gold, and lose his office for conscience sake, but of how many of the rest should we have to say that they have preserved their office, but that their fine gold has become dim?

We must deal with men as they are; and if the amendments deal with them upon any other theory, they are not fit to become parts of a constitution for a community of men.

This appeal to the people failed, but he never abandoned the cause. Twenty years later, in his "Leaders of the Old Bar," he wrote:

We are now under the direction of a fearful mandate, which compels our Judges to enter the arena of a popular election for their offices, and for a term of years so short, as to keep the source of their elevation to the Bench continually before their eyes. . . .

At the formation of the Federal Constitution in 1787, the tenure of the judicial department was thought by our forefathers to be not only the guarantee of that department, but the best guarantee of all the departments of government. What guarantee is there for the Constitution itself, if you emasculate the judicial department, the only one that is a smooth, practical, wakeful, and efficient defence against invasions of the Constitution by the Legislature—the only one that can be efficient in a republican representative government, whose people will not bear a blow, and therefore require a guarantee whose blow is a word? A leasehold elective tenure by the judiciary, is a frightful solecism in such a government. It enfeebles the guarantee of other guarantees—the trial by jury—the writ of habeas corpus—the freedom and purity of elections by the people—and the true liberty and responsibility of the press. . . . What can experience or foresight predict for the result of a system, by which a body of men, set apart to enforce the whole law at all times, whatever may be the opposition to it, and whose duty is never so important and essential as when it does so against the passions of a present majority of the polls, is made to depend for office upon the fluctuating temper of a majority, and not upon the virtue of their own conduct?

This opinion he never relinquished. The day may be distant when the demand for a truly independent judiciary will be strong enough to so change the state constitutions as to secure it, but in New York, at least, that demand is beginning to be heard. Mr. Binney naturally feared that the abolition of the good behavior tenure of state judges presaged similar action in regard to the Federal judiciary, but on that point public opinion is evidently now more conservative. The Federal bench stands higher to-day in public esteem than the state bench, so that wherever the former's jurisdiction extends, parties litigant nearly always seek it, in preference to the state courts,—a manifest recognition of the value attached to judicial tenure based on good behavior only. The Pennsylvania Constitution of 1874, giving the Supreme Court Judges a term of twenty-one years and forbidding their reëlection, was a partial return to the good behavior system, and the influence of Mr. Binney's opinion on the subject, which was undoubtedly known to many of the framers of that Constitution, may well have contributed to bring about the change.

Of Horace Binney's reputation as a lawyer it is perhaps enough to say that no one would ever think of not placing him among the first. In a debate in the House of Lords in 1862, in regard to the arrest of British subjects in the United States, charged with aiding the Confederate cause, Earl Russell, when quoting Mr. Binney's *Habeas Corpus* pamphlet,

spoke of him as "at the head of the bar in Philadelphia." That he was so is always conceded, but in the opinion of many he stood at the head of the whole bar of the United States, though he himself always laughed at the suggestion. It is true that prior to 1844 he had not the great national reputation which was undoubtedly his after that year. His previous arguments before the United States Supreme Court, though successful in all but one instance, had not been numerous, even for those days, and had not been made in cases of absolutely first importance. In the Girard Will Case, however, the establishment of charitable trusts in general upon an unassailable legal basis in the United States was universally owned to be his work, both in the research which preceded the argument and in the argument itself, which was practically an epitome of the whole law upon this subject. It is not too much to say that from this time on he was regarded, throughout the whole country, as one of the very foremost of all American lawyers. Certain it is that as long as the law of charitable trusts shall exist as a part of American jurisprudence, his name will be inseparably connected with it.

His position at the bar was not due to his abilities alone; it also resulted from appreciation of his character. He was recognized as having always stood for the highest ideals of professional conduct. Absolute fidelity to his client, absolute fairness to his opponent, untiring industry in the preparation of

cases for trial, sincerity in argument, complete avoidance of everything in the nature of trick or artifice—it was in such matters as these that he was regarded as the model lawyer. In his private record he wrote, "I never prosecuted a cause that I thought a dishonest one, and I have washed my hands of more than one that I discovered to be such after I had undertaken it, as well as declined many which I perceived to be so when first presented to me," and he could have said the same publicly without the least fear of contradiction or even of doubt. He did not devote himself merely to the winning of cases, nor even merely to the upholding of sound legal doctrines, but rather to seeking in every way to maintain the highest standards and traditions of the profession, and to fighting with all his strength against the many influences which tended to lower them. As a consistent example of what may be called legal righteousness, his life was of incalculable value to those who followed him.

He was, however, not merely a great lawyer; he was also a great citizen. He rarely, indeed, held public office, a single year in the Legislature, five years in the Councils of Philadelphia, and a single term in Congress comprising his entire official life; but his influence was greater than that of many public men, and his fellow citizens turned to him repeatedly for advice and guidance. In 1824, when the Chamber of Commerce sought to oppose the enactment of a protective tariff, it was he whom they

asked to prepare the memorial to Congress, and he did so as a patriotic duty, refusing all compensation. When, in 1840, he alone protested against the payment of a city debt in depreciated currency, and the Councils abandoned the scheme, it was said that no other man in Philadelphia could have won such a victory over the city government and the banks, or would even have attempted it. During the anti-Catholic riots of 1844, the Mayor and Councils seemed powerless, until they sent for him to show the citizens how order could be restored, and life and property protected. During the dark days that intervened between the election of Lincoln and the attack on Fort Sumter, Mr. Binney anxiously watched the gathering storm, convinced of the impotency of the Buchanan administration, and that for the moment the only attitude for patriotic men was one of calmness and patience, until either wiser councils should prevail in the South or some definite step could be taken to preserve the Union. The moment that the crisis came, he was ready for action, and the reply which he wrote to the President's call for troops gave the signal to the loyal citizens of Philadelphia, without distinction of party, to pledge their support to the government. With the publication of that loyal address, the position of the city and the state ceased to be doubtful, and it was settled that the line between North and South, should it have to be drawn, would *not* "run north of Pennsylvania," as had been claimed.

Mr. Binney lived until August 12th, 1875, and the unique position which he ultimately held in Philadelphia was no doubt due in part to his great age. He was the visible link which bound the days of the Centennial to those of the Revolution. He had seen and known Washington, Hamilton, Adams, and the other leaders under whom the colonies had become a nation. He had striven to perpetuate the Federalist party in the days of Madison, he had opposed the ascendancy of Jackson, and he had defeated Webster in legal argument. He had brought his acute mind and able pen to the aid of Lincoln, and to him Grant had come to pay the respect due to his years and reputation. But it was not only the length of his life which was remarkable. During the seventy-five years since he had come to man's estate no one could point to any failure on his part to respond to the call of duty, to any good cause that he had deserted, to any bad cause that he had espoused, or to any act in which he had not shown absolute fearlessness as well as absolute devotion to what he believed to be (and what the test of time usually proved to be) the right principle. Partisan or professional opponents might criticize him, but they could never impugn his motives, his sincerity, or his courage. It was the character of his life, and not merely its length, which made him, in the words of the well-known English judge, Sir John Taylor Coleridge, "the great citizen of Philadelphia."

JOHN CATRON.

JOHN CATRON

From a photograph taken at Nashville in 1860, when Judge Catron
was seventy-nine years of age.



JOHN CATRON.

1781-1865.

BY

HENRY HULBERT INGERSOLL,

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A JOHANNINE Triumvirate were master-builders on the broad foundations of Tennessee jurisprudence. They were John Overton, John Haywood and John Catron—and the greatest of these was Catron. Contemporaries they were, but hardly judicial confrères. Overton's period of service extended from 1804 to 1816; Haywood's from 1812 to 1826; Catron's from 1824 to 1834. Thus their united terms of service covered the thirty years from 1804 to 1834, which was the formative period of Tennessee jurisprudence, Haywood's term overlapping and connecting the other two, so that the chain of their predominant influence was unbroken for three critical decades, which form the Jackson Period in Tennessee history, culminating in the adoption of the second Constitution, which was the beginning of a new era in the state.

Among their judicial associates were learned and distinguished men, Hugh Lawson White, Jacob Peck, Felix Grundy, Robert Whyte and George W.

Campbell, who wrought with skill and fidelity on the granite foundations of our legal structure; and some were called for reward into the broader field of national life in the senate and the cabinet, where their political labors shed luster upon Tennessee; but Overton, Haywood and Catron, each in his time, was, judicially speaking, *facile princeps*, and set the stamp of his genius indelibly upon our early jurisprudence. Together they constitute the judicial dynasty of our Jackson Period. The State acknowledges its debt of gratitude to each and all, and the writer welcomes this opportunity to place a stone upon the Catron cairn.

Born in Wythe County, Virginia, on the summit of the Blue Ridge near the fountain head of the Tennessee (there called the Holston) River, and gradually during his boyhood drifting westward, John Catron attained to manhood on the western slope of the Cumberland Plateau, and was thus a sample product of middle Appalachia, where grow the largest average men upon the globe. He was of heroic mold, over six feet high, and weighing more than two hundred pounds; of decided brunette type, with massive forehead, kindly black eye, and abundant dark hair and eye-brows; a large nose and mouth with lips firm set, and a strong jaw indicative of purpose and resolution. Both face and form were of a type not uncommon among the stalwart population of the Virginia and Tennessee Valleys; and yet, there was about John Catron a marked individuality, an

assurance of strength and abounding vitality that irresistibly attracted attention, and would cause men and women to turn and look at the commanding figure of the man on the streets amongst the passing throng.

He was always a patriot. After the horrible massacre at Fort Mims, by the Creek Indians, inspired by the imperial Tecumseh and emboldened by British alliance, the people of Nashville called upon General Jackson to organize and lead an army for the protection of the southern frontiers against the aggressive and cruel Creeks. Jackson responded with the following characteristic address to the men of sparsely settled Tennessee:

The horrid butcheries perpetrated on our defenseless fellow citizens near Fort Stoddart cannot fail to excite in every bosom a spirit of revenge. The subjoined letter of our worthy Governor shows that the Federal Government has deposited no authority in this quarter to afford aid to the unhappy sufferers. It is wished that volunteers should go forward, relying on the justice of the general Government for ultimate remuneration. It surely never would be said that the brave Tennesseans wanted other inducements than patriotism and humanity to rush to the aid of their bleeding neighbors, their friends and relations. I feel confident that dull calculations of sneaking prudence will not prevent you from immediately stepping forth on this occasion, so worthy the arm of every brave soldier and good citizen. I regret that indisposition, which, from present appearances, is not likely to continue, may prevent me from leading the van; but indulge the grateful hope of sharing with you the dangers and glory of pros trating those hell-hounds, who are capable of such barbarities. In the meantime, let all who can arm themselves, do so, and hasten to Fort Stephens.

John Catron was among the hundreds who answered the call and formed the little army with which Jackson defended the frontiers of Georgia and Tennessee by attacking the Creeks in their own strongholds in Central Alabama, and, after a campaign of great privation and hardship, achieved his purpose and conquered permanent peace in the decisive battle of the Horse Shoe. The Creek campaign embraced all of Catron's military life and service. Having honorably won the right to continue his study of law in peace, he resumed his broken *quadrennium* in the beautiful country among the western foothills of the Cumberland Mountains.

What had been the life of Catron before the Creek campaign cannot be recorded in detail. He seems to have preserved a studied reticence as to his early life; and, when invited to make it public, he chose to leave its dates and details in obscurity. He could boast no lineage of renown, and doubtless preferred to leave its incidents unpublished. Perhaps the poverty of his surroundings on the frontier, and the hardships and struggles of that early manhood had no pleasant reminiscence for him. At any rate Nashville tradition has it that, after he came there to live, he did not in his new environment relish the chaffing allusions to his early occupations made by old acquaintances from the upper Cumberland country at chance meetings on their trading visits to the capital city. Perhaps he was ashamed of his early indolence, for in his own scant statement of the incidents of his early

life and in judicial allusions thereto will be found evidence that his young manhood was frittered away in the roystering pastimes and reckless indulgences of those days amongst the Cumberland mountaineers, and that his life of earnest purpose did not begin till he was thirty years of age. His contact with General Jackson, who, having successively held the offices of State Solicitor, District Attorney, Congressman, Senator and Superior Court Judge and voluntarily resigned every one of them, was then fighting the battles of his country in our Second War of independence, and the enlarged horizon of life gained in the Creek War doubtless gave renewed incentive to his ambition for a noble life and nerved him in the resolution already formed to employ his talents at the bar. The wish to conceal this waste of time may explain not only the glittering generalities of his autobiography, but also his spinster-like reticence as to the date of his birth, which he disclosed to his family only in the last years of his life. That date, as given by his niece, was 1781, nearly mid-way between the two dates, 1778 and 1786, reported in previous biographies.

The account of Judge Catron's early life furnished by himself in 1851 for publication in Livingston's *Portraits of Eminent Americans* is as follows:

I do not believe there is any man living who could give you any tolerable account of my early life except myself; and when the incidents were narrated your readers would only learn that I had been reared on a farm, and been flogged through the com-

mon schools of Western Virginia and Kentucky, and then had the advantages of such academies as the Western country afforded,—humble enough, in all conscience, and where little else than Latin and the lower mathematics was added to the common-school training; that, with this amount of acquired knowledge I read history, novels, and poetry; grounded myself well, as I thought, in Virginia politics; that I read everything which came to hand as it came,—Fielding, Smollet, Sterne, Goldsmith, and up through Tom Paine, Hume, and Gibbon. Everything, or nearly so, then to be had in the country, of history, ancient and modern, was read, and much of it with a devouring appetite. Prester John, Peter the Hermit, Richard and Saladin, Falstaff and Frederick, were all jumbled up together. It is due, however, to say that preparatory to taking up Blackstone I carefully re-read Hume's "History of England," with Smollet's and Bisset's continuations; Robertson's "Charles the Fifth," and also Gibbons' "Decline and Fall," and made extensive notes on each, which I thought exceeding valuable at the time. They were on large foolscap, bound in pasteboard, and, all told, were, when packed on each other, two-thirds as high as a table; nor did I doubt that my condensed Gibbon would go forth some day in print; nor do I now remember at what time it was used to kindle the office fire, but this was its fate. With my old friends, Pope, Shakespeare, and Sterne, I had to act as I have often done since with my snuff-box,—hide them from myself. The Bible being the common reader of my early schools, of course I knew almost by memory. Of geography I learned more than most men and know more now.

Irving's *Knickerbocker*, then recently published, was also a favorite book with Catron and in after life was his frequent resort for recreation and amusement. For how many years he endured the flogging of the Virginia pedagogues, and how many

the Kentuckians practiced upon him, there is no means of ascertaining.

For the better part of his tuition he was indebted, as were most of the Appalachians of the eighteenth and half of the nineteenth century, to a Presbyterian minister. The name of his tutor was Rev. James Witherspoon, who taught in the upper Cumberland country about a hundred years ago. But Judge Catron seemed to regard his education as self-acquired, as appears from the Livingston sketch which proceeds as follows:

With this confused mass of self-taught knowledge I commenced to read law in April, 1812, in the State of Tennessee. Up to this date I had never been sick a day or hour and had a frame rarely equaled; one that could bear ardent and rigorous application for sixteen hours in the day, and which was well tried about four years at something like this rate. Late in 1815 I tried my chances at the bar and succeeded, certainly in the main chance of getting fees; but then I had a good deal of worldly experience and availed myself of the cases in court, throughout the circuit, of a retiring brother-lawyer and friend who was elected to Congress.

When he removed from Kentucky to Tennessee does not appear; nor where he first resided; nor under whom, if any one, he pursued his course of legal study. One of his admirers, Col. John H. Savage of McMinnville, Tennessee, perhaps in imitation of Judge Catron, some twenty years later read law for fifteen hours a day; and, that he might pursue his studies undisturbed, built a cabin on the mountain side and occupied it alone for the full period of two years, while he pored over his Coke, Blackstone,

Comyn, Bacon, Tidd, Chitty, Sugden, Fonblanque and Starkie, who were the standard authors of that day.

Young Catron came to the bar in White County, and probably resided at Sparta, the county town, where in those days sat the Supreme Court for the Mountain Circuit. Military service rarely goes unrewarded in Tennessee, and John Catron, ere he had been at the bar a year, was chosen "Attorney-General" for this Circuit, and entered zealously upon the performance of the important duty of regulating the conduct and punishing the crimes of the lawless mountaineers. This has been the coveted office of the young lawyer in Tennessee from the organization of civil government, when Andrew Jackson rode a circuit four hundred miles long, and tamed the outlaws of the frontier into respect for civil authority. In it Catron found congenial and absorbing occupation and abundant opportunity for the display of his talents, on which he thus comments:

The courts were full of indictments for crimes from murder down. Here I had to fight the battle single and alone and to work day and night. No man ever worked much harder, I think; my circuit judge was an excellent criminal lawyer, and being partly Scotch always stood firmly by the State and leaned strongly against the culprit; so that I got on very well, but often with an arrogance that would have done credit to Castlereagh, for blundering in my law certainly, if not in my grammar. Like His Lordship, I was given to white waistcoats and small-clothes, and drew pretty largely on the adventitious aids furnished by the tailor.

This fondness for fine clothes did not forsake Judge Catron as he advanced in life and honors. He was ever appreciative of the good work of the tailor, and a favorite with the trade. But in later life his usual dress, comporting with the dignity of his position, consisted of the finest broadcloth frock coat, the best of doe-skin trousers, and rich silk-velvet vest and a broad satin stock—all black.

The life of the circuit-riders of the Mountain Circuit in the 'teens of the nineteenth century while he was "Attorney-General," Judge Catron thus describes:

The lawyers then travelled the circuit from county to county usually of a Sunday. Each man, that was well appointed, carried pistols and holsters and a negro waiter with a large portmanteau behind him. All went on horse-back. The pistols were carried not to shoot thieves and robbers, but to fight each other, if by any chance a quarrel was hatched up furnishing an occasion, for a duel was then a very favorite amusement and liberally indulged in; and the attorney-general for the circuit was expected to be, and always was, prepared for such a contingency. He managed to keep from fighting, however. His equipments were of the best, with a led third horse now and then for the sake of parade.

The boisterous habit of these belligerent brethren brought such reproach upon the profession that in 1817, under the lead of Judge Hugh Lawson White, then a state senator, the General Assembly enacted the first effective law against duelling which prescribed an official test oath; and this led gradually to other legislation and official and judicial action

which entirely abolished the practice in the state. In this social and professional reform Judge Catron, when on the Supreme bench of the state, bore conspicuous and honorable part.

Calvin Smith, an attorney who had been stricken from the roll of the Maury Circuit Court for accepting a challenge in Tennessee and killing his challenger in a duel in Kentucky, appealed in error to the Supreme Court, assigning for reversal error in procedure, and also on the merits. Judge Catron, in an elaborate opinion affirming the sentence of expulsion, disposed of the question of procedure on charges against an attorney for professional misconduct by the sententious statement: "Pleas and demurrers never entered the minds of the legislature when prescribing the mode of proceeding against an Attorney; they only meant that the plain man, ignorant of law, should have a plain remedy against a member of the profession possessing many advantages in skill over him;" and then answered the contention of counsel as to the "honorable conduct" of the appellant in the premises with such convincing and comprehensive treatment of the subject as to make *Smith vs. State*,¹ a leading case on the *code duello*. So profound and lasting was the impression made by this opinion upon the bar and people of the state, that its conclusions found expression a few years later in the fundamental law of the state at the Constitutional Convention of 1834, totally disqualifying from office the duellist

¹ Yerger's Reports, 228.

and his abettor. Better illustration of the moral fibre, mental grasp, judicial habit and literary style of Judge Catron in the early days of his long service as judge cannot be found than in this opinion.

After two years of arduous circuit-riding service, not only prosecuting efficiently the "pleas of the crown," but also engaging in the trial of many civil suits left to him by his unnamed Congressional friend, John Catron, on the recommendation of General Jackson whose Hermitage was within the boundaries of the Capital County, left his rural office and his circuit-riding on the upper Cumberland and moved down to Nashville, the legal, social, and commercial as well as political capital of the state, and engaged in general practice. His striking personality, unwearyed industry, physical and mental ability, and the fact that he was a protégé of General Jackson soon won for him a numerous and strong *clientele*, and insured his professional and pecuniary success. Judge Jo Guild, of Gallatin, in his unique account of "Old Times in Tennessee," speaking of Catron at this time, says:

"He was a laborious student, careful, painstaking in the examination of authorities and the preparations of his cases, and never appeared in a cause on the spur of the moment. His citations of authorities showed that he snuffed the midnight lamp in the labor bestowed upon the cases entrusted to his care. He was a harsh, unpleasant speaker, with a squeaking, unmelodious voice, and his gestures were like those of a man engaged in a fight; but there was a continual flow of hard, practical sense, while his argument was so enforced by homely illustrations, that his speeches

were not only interesting but frequently convincing. He generally left a black eye before he came out of the battle."

After six years of strenuous practice at the Nashville bar, wherein his years of preparation by severe study made him ever ready to meet in contention the members of the strong bar, that has always characterized the capital city, John Catron was in 1824 chosen by the General Assembly to a vacant place upon the Supreme Bench, and filled the position with ever increasing ability until 1836, when, in the reorganization of government under the new constitution, this distinguished disciple of Jackson, to use his own words, "was beaten and turned out" by the Whig majority under the leadership of John Bell, who had proven his power and established his prestige as a practical leader by defeating Felix Grundy, in a memorable contest for Congressional supremacy in the Hermitage district in 1827. Grundy was at the time of his defeat at the zenith of his fame, and had the support of General Jackson, then just coming to the presidency.

In the first half of Judge Catron's twelve years' service on the Supreme Bench of Tennessee his confrères were Robert Whyte, John Haywood and Jacob Peck, each presiding in turn a week at a time. When the Court was reorganized in 1830, Judge Catron was chosen Chief-Justice, and held this position during the remaining period of his distinguished service on the state bench. The associate judges of the Court during the first four years were

Whyte, Peck and Nathan Green—during the last two, only Peck and Green.

It is no small tribute to Judge Catron that he was given first place in such company, and was always by common consent to retain his standing as *primus inter pares*. Robert Whyte was easily the most learned technical lawyer of the state in his day, and held place on the Supreme bench for eighteen years. Jacob Peck though of less learning was possessed of great intellectual vigor and judicial acumen, and served as Supreme judge for fourteen years. Nathan Green, "The Tennessee Hardwicke" who wrought with such distinguished fidelity on our equity jurisprudence as to earn the title of its "foster-father," served as Supreme Judge in Tennessee for twenty-one years—a period of service never attained by any other Supreme Judge in the state.

It was a Court of errors and appeals, criminal and civil. There was no limit to its jurisdiction and all imaginable questions of law were brought up to be threshed out before it, on a single written copy of record, containing no assignment of error; and counsel might interrupt the reading of the transcript to interject their points of contention *ore tenus*. In many cases no counsel appeared at the hearing, and the Court seems to have been left to hunt out for itself, the grounds of error on appeal. In others, as the volumes of Yerger's Reports abundantly testify, the Court received invaluable aid from briefs of exhaustive erudition submitted by such eminent

counsel as the Yergers, Joseph S. and George S., Return J. Meigs, the Foggs, Godfrey M. and Francis B., and Thos. Washington, and the cogent arguments of Thos. H. Benton, John Bell, Hugh Lawson White, Pryor Lea, Spencer Jarnagin, John Williams and Robt. J. McKinney.

All the opinions delivered by Judge Catron are found in the first eight volumes of the Yerger series of Tennessee Reports, and present in vigorous style and sententious expression his views upon nearly every phase of human conduct and relation, in contract, tort and crime and upon both legal and equitable rights in property. Extracts from a few of them of unusual interest or special uniuity must suffice for insight into the mind of the judge and the heart of the man.

Smith vs. State, referred to above, was not more efficient in proscribing duelling than was State vs. Smith,² in proscribing gambling in Tennessee. Judge Catron's utterances in condemnation of both these practices, so common and so baleful in his time in both Kentucky and Tennessee, have all the fire and force of the sentences of the Hebrew judges and prophets; and only the experience of close contact could have qualified him for the elaborate statement of details found in the latter case, wherein, Smith convicted of gaming by lottery had been fined five dollars only, and the attorney for the state had moved for writ of error on the ground that the Court

² *2 Yerger's Reports, 271.*

should add, to the sentence of the trial Court, disqualification from office.

Others were also indicted for the same transaction, and being a test case, this one was stubbornly contested and resulted in a divided Court. Speaking for the majority Judge Catron said:

The presumption of law is, that every man has acquired his property honestly; and it is the policy of every well-regulated government, that he shall not be deprived of it without a fair equivalent. This is particularly the case in republics, where all should be independent in the means of subsistence. Reduce a man to want by gaming, or otherwise, and he is no longer free to exercise the elective franchise, but dependent upon the hand that furnishes himself and family with bread. Not only ruin and beggary, but drunkenness, is almost uniformly the effect of gaming; the two vices combined are more likely to sap the foundations of our institutions than all others put together. Destroy freedom of thought, and independence of action, in voting at primary elections by the people, and the idea of governing by majorities is a farce, the popular will a delusion, bowing to the dictation of the wealthy minority. The patriot, anxious for the prosperity of his country and the durability of her institutions repines at the thought of seeing the haggard, hungry, and naked gambler, or the besotted drunkard, dragged to the polls, and forced to vote according to the beck of his, I might almost say, master; and he a champion of the *loo* table or *faro* bank. In pecuniary means and political power, knavery rises upon the ruins of honesty and independence. Wheresoever, in these republics, gaming is in any shape tolerated, pauperism, supported by the government, is, in nine instances in ten, the consequence of it and its kindred vice, drunkenness.

There is implanted in the nature of man an inclination to gamble, which of all others is most difficult to bring within the re-

straints of law. The Indian will stake his wife, the ancient German would stake himself, to gratify the passion. Tacitus, ch. 24. From these, Sir William Blackstone, (4 Com. 171,) supposes our ancestors, the English, must have inherited it, and entailed it upon their descendants.

Like other passions which agitate the great mass of the community, it lies dormant until once aroused, and then with the contagion of pestilence, it sweeps morals, motives to honest pursuits and industry into the vortex of vice; unhinges the principles of religion and common honesty; the mind becomes ungovernable, and is destroyed to all useful purposes; chances of successful gambling alone are looked to for prosperity in life, even for the daily means of subsistence; trembling anxiety for success in lotteries, at the faro bank or loo table, exclude all other thoughts. Expectation is disappointed; more losses are sustained; the highly excited and desperate feelings are kindled by drunkenness, from which arises a wretch, with a recklessness and desolation of feeling, that the genius of a Shakespeare or a Milton could not, nor can any man, describe. Swindling, forgery, theft — every crime that extreme necessity and outcast desperation can suggest to a man, lost to all the moral ties, though guarded against, are likely shortly to follow in the train. We ask him who has known the world and ways of men as they are, not as they should be, are these not truths? Have you seen the poisoned arrow pierce the devoted victim? Have you seen him driven to desperation, and end his misery in self-destruction? Have you yourself felt the sting of this deadly passion? If you have known and felt these, you can, and do, understand us. Who that has gambled much, and to excess, has not partly seen and felt in a thousand shapes the picture of misery here sketched, presenting instances of mental degradation and agony, melancholy as any with which offended Heaven has ever permitted the mind of man to be afflicted? He who imagines this to be extravagant fancy has never sat at a loo table, dealing at ten dollars and forfeiting an hundred, for perhaps a week together, or half a week, without sleep or ceasing to play.

If he has when young, he will appreciate the feeling (should his head now be gray) that induces him to look back with awe upon the vices and misfortunes of his youth; he may be marked as the earnest advocate of highly penal statutes, to deter his son from similar outrages upon the laws of his God, and the laws of this, and, we could hope, of every civilized land. We wish to set forth the wise policy of Tennessee; not by declamation, but by our knowledge of practical truths; still, the melancholy desolation of the mind of man in ruins cannot be given as a fact; it must be described. To protect man against the phrensy of his own mind, we have legislation. We are called upon to execute the laws up to their highest penal sanction, that of depriving a citizen of his equal rights to hold office with his fellow men; we find the law constitutional, imperious in its commands, and are determined firmly and fully to execute it. It is our wish as also our duty, to inform the people of Tennessee of the reasons of its enactment, rigorous execution, and the dangers pending over them in case of its violation."

This would seem to have sufficed for the moral aspect of the case, but that there might be no lack of information to the people of Tennessee he proceeds with the familiarity of an expert to depict the details of this and its kindred vices; to which he adds an impassioned objurgation of gaming. Little wonder is it that Judge Peck explained his dissent in the following words of sly suggestion of the experience of its author:

I speak on the subject of gaming with diffidence. My habits have never led me into it, even so far as to learn a single game beyond the backgammon board; and even on that, I have never attained so much skill as to venture the smallest sum; though sometimes I may have purchased lottery tickets."

Our courts and legislatures have ever since followed this opinion of Judge Catron; and gambling of all kinds, except betting on target practice and horse racing is forbidden by stringent laws.

Judge Catron often dissented from his confrères—indeed those were the days of independent judgment and separate opinions, even when concurring in result. But his own judicial habit in this matter, showing he was not unduly tenacious of opinion, is shown in the concluding sentences of his opinion in *Tisdale vs. Munroe*.³

My brother judges think it was right, and I will not say it was wrong; to do so, would be giving a stubborn force to pre-possessions and doubts, inconsistent with judicial duty, and the due administration of the laws. This court doth therefore adjudge unanimously that the clause of the British statute above recited does bar the action, and order the judgment of the circuit court to be affirmed."

In another case in the same volume he declared very positively that the statute of descents had repealed the common law rule of survivorship in estates held in conjugal entirety. In the later case of *Taul vs. Campbell*,⁴ between the same parties, Catron overrules this case in the following singularly impersonal declaration:

No estate passed, on the death of Mrs. Taul, to her heirs, for the statutes of descent to operate upon; nor has the statute any bearing on the true and only question in this cause—the char-

³ 3 *Yerger's Reports*, 324.

⁴ 7 *Yerger's Reports*, 337.

acter of the title Mrs. Taul died seized of; and, in supposing it had, Judge Catron was clearly mistaken in the opinion he expressed in *Campbell vs. Taul*, at Sparta. He took it for granted that Mrs. Taul had a fee-simple estate; whereas, it had annexed to it a condition in law, that it should continue to the longest liver.

Commenting in *Combs vs. Young*⁵ upon the statute which had restricted the right of dower to those lands only of which the husband "dies seized and possessed," Judge Catron thus eloquently vindicates the wisdom of the old common law rule that the widow should have dower of all the lands of which the husband was seized during coverture:

Few provisions in our statute book have been fraught with worse consequences than the repeal of the principle of the common law, founded on the wisdom of ages; so ancient that neither Coke nor Blackstone can trace it to its origin; wide-spread as the Christian religion, and entering into the contract of marriage among all Christians: the husband on the most solemn occasion of his life, contracting that of all his worldly goods he endows his wife.

All these high sanctions of the first rights of married women are set at naught by the act of 1784, so celebrated in other respects. Widowhood and poverty in the state of Tennessee are associated in the mind, with but now and then a partial and rare exception, to relieve our suffering sympathies from the general misery. The affluent wife, reduced in an hour to the impoverished widow, presents a contrast which, for bold abruptness, has few parallels in the ordinary misfortunes incident to human life. Cut off from dower at the freak or by the occasional ill-will or dissipated habits of the husband, until nothing of the real estate

⁵ 4 Yerger's Reports, 227.

worthy the name of dower is left to her on his death; allowed the sorry pittance of a child's part of the personal property, with generally a large and often helpless family of children on her hands, neither energy nor dignity of conduct can be expected from the widow, nor is it possible in most cases. The children are of necessity raised in accordance with the destitute circumstances of the mother. It matters little that they have property; to her they look for support and education. Not so much at the school as in the well ordered family are children educated; there it is that morality, industry and propriety should and must be mainly taught. To this end, the widow's means are greatly inadequate in this state; wholly so, in most instances. But too often she is driven into a second marriage, the most unadvised and unfortunate, ruinous to her peace and the prosperity of her children, to escape from her poverty-stricken wretchedness.

Judge Catron delivered the opinion of the Court in the celebrated case of *Grainger vs. State*,⁶ which for a half-century was made to do service throughout the south and west on the trial of murderers, and doubtless cheated the gallows of its just deserts hundreds of times. It thus became notorious as a bulwark of defense and was not uncommonly supposed to have introduced new doctrines into the law of homicide in self-defense, whereby a man, especially if a coward, could justify himself in killing his unarmed assailant with a deadly weapon. This was a clear perversion of a just opinion, which was avowedly based on standard common law authority, and not intended to change the settled doctrines of the law of self-defense.

⁶ 5 *Yerger's Reports*, 459.

The case was peculiar in that no error was assigned or noticed in the charge to the jury, nor for that matter in any other particular; but instead of treating the case as on error merely, the Supreme Court examined narrowly the facts in the record and boldly declared that they did not show malice pre-pense, and therefore reversed the capital conviction, and awarded a new trial.

Grainger, a timid hunter carrying his gun, was beset one night by Broach, an unarmed drunken bully, who pursued him for a mile, meanwhile vilifying him and striking him once with his fist. Grainger dismounted and sought refuge in a cabin; but admittance was refused by the occupants. Broach also dismounted and followed him, and Grainger threatened to shoot him. Broach replied: "You would not shoot a cat," and kept advancing on Grainger, who shot and killed him about six yards off. This was the case. Judge Catron in acquitting Grainger of the capital crime said:

If the jury had believed that Grainger was in danger of great bodily harm from Broach, or thought himself so, then the killing would have been in self-defense. But if he thought Broach intended to commit a battery upon him less violent, to prevent which, he killed Broach, it was man-slaughter.⁷

That is the essence of this *cause célèbre*. Obviously it was a just judgment of reversal, and placed upon solid reasons for doing what the trial judge

⁷ Citing, Hawkins' Pleas of the Crown, vol. I, Chap. 28, sec. 23; 1 East's Common Law Reports, 272.

should have done—grant a new trial. The wholesale abuse and perversion of the case found its pretext in Judge Catron's omission to insert after "thought himself so" the qualifying phrase, "upon sufficient grounds," which doubtless were omitted because the grounds could not but be seen in this case.

The longest judicial contention ever experienced in Tennessee was over the effect of adverse possession of land for seven years under color of title. It lasted for nearly a quarter of a century, with results generally in favor of the paper-title connected with the state grant. The great triumvirate were all upon the opposite side when at the bar, and perhaps were chosen to the bench because of their prepossessions in favor of the actual occupant. Judge Overton, however, found himself always in a hopeless minority, until reënforced by Judge Haywood. Their point service, however, was too short to change the legal doctrine; and it was left to Haywood alone to enjoy the judicial triumph of the doctrine that the occupant need not deraign his title from the state in order to establish his right to the land under seven years of actual, adverse and notorious possession. This doctrine was established by repeated decisions made by the Court prior to 1825 and it only remained to Judge Catron in *Love vs. Love*, to put the capstone on the edifice by declaring that, the law must be enforced as written, and where the legislature had made no exception the Court could make none; and therefore it was immaterial that the occupant, who

had held adversely for seven years under color title, had taken his deed with knowledge that it did not convey a good title. It must stand to the credit of Judge Catron that he contributed by his decision in this celebrated case to the repose of society in the enforcement of the law in favor of the citizen farmers of Tennessee.

Catron's influence upon the jurisprudence and morality of the state of Tennessee by his twelve years of judicial service amongst a pioneer population when institutions were being molded, social habits being formed, and a constitution for the state was being formulated, under which it attained its greatest prosperity and its highest judicial fame, was such as entitle him to the first rank among the citizens and lawyers whom our people and profession delight to enshrine in their Hall of Fame.

Himself converted from the error of his way as a roystering gambler, a sporting horse-breeder and a patron of the code, he employed not only the authority of the law to compel, but all the powers of his intellect to persuade the people to abandon habits so fraught with evil to them and to their dearest hopes. And the present laws and public sentiment of Tennessee in condemnation of their depraving tendencies is an irrefutable testimonial to the crowning success of his judicial crusade against their debasing tendencies.

No small credit for Judge Catron's influence and example as a moral reformer and an elevator of so-

ciety, is due to his love for and devotion to a pure, good woman.

In 1807 he married Miss Matilda Childress of Nashville, daughter of John Childress and granddaughter of General James Robertson, "the father of Tennessee;" and for over forty years, though childless, their conjugal life illustrated the virtues of the holy state of matrimony, and the refining, social influence of a hospitable Christian home. The old house on Cherry Street, much altered to meet the trade demands of a modern metropolis, and strangely perverted to alien uses, is now used for saloons, and the quarters of the "Southern Turf," were just opposite the famous "Room No. 5" in the Maxwell House, the headquarters of Andrew Johnson, and many other active politicians of these *post-bellum* times.

In the last year of his service as Chief-Justice, Catron contributed to the press a series of articles in vindication of President Jackson's course in the "removal of the deposits," which attracted attention by their trenchant style and argumentative force, and added no little in confirming the popular approbation of that drastic *coup d'état*.

General Jackson never turned his back upon his enemies nor his friends; and the latter he delighted to honor. When, therefore, by the Act of 3d March, 1837, on the very last day of his last term of office, the number of Justices of the Supreme Court was increased from seven to nine, and opportunity came to

him to select for nomination two persons to fill these new stations on this august tribunal, it was characteristic of "Old Hickory" that, recalling the patriotism of the Tennesseans who had responded to his clarion call for volunteers for the Creek War, and shared with him the privations and dangers, as well as the glories and triumphs of that campaign, and remembering the unfaltering friendship during the years of his political contention, that he should choose for one of the places his life-long friend, who had so long adorned the Supreme bench of his own state, and was easily the ablest and first of her judicial statesmen. Accordingly, as the Executive Journal of the Senate shows, John Catron was nominated for Associate-Justice of the Supreme Court by President Jackson, March 3d, 1837, and confirmed five days later during the administration of President Van Buren. Henceforth, he belonged not to the state to which he had zealously given his best services as soldier, citizen, Attorney-General and Chief-Justice, but to the Federal Union to which he was attached with sentiments of supreme devotion.

Mr. Justice Catron was assigned to the Eighth Circuit, then composed of the states of Tennessee, Kentucky and Missouri, with the laws of which he had special acquaintance; and in the decision of cases involving the settlement of real estate controversies from these states his learning proved to be of peculiar value to the Court. His experience had not given him extensive knowledge of admiralty, and

commercial and corporation law; but he had few equals in the learning of the common law and of Equity Jurisprudence; and constitutional law was at that time the common heritage of the lawyers of the Mississippi Valley. He had no patience with the modern fashion of the case lawyer, beginning to show itself in his day, who gathers cases, often from the index, irrelevant and unconsidered, and without value save to "make a parade of the address of vanity to ignorance." He insisted on a thorough analysis of every case, and an application of the touchstones of sound doctrine and fundamental principle to every question in it, holding with Lord Coke that reason is the life of the law.

His services on the Federal bench belong to the second great period of the Supreme Court, in which the Federal Courts declared their independence of the decisions of the state tribunals in questions of commercial law. In this period a check was given to the growing and presumptuous demands of monopolies, and the just balance of the centripetal and centrifugal forces of the Union was preserved by asserting and laying stress on the reserved rights of the states, with as much force and vigor as had been laid on the Federal authority under the lead of Chief-Justice Marshall.

The members of the Court, to whom the favor of General Jackson introduced him, were Chief-Justice Taney and Associates Story, Thompson, McLean, Baldwin, Wayne, and Barbour, all of whom

save Story and Thompson were appointees of Jackson, to whom was added in the same year McKinley of Alabama. It was indeed a Jackson family, and, though somewhat changed in personnel, yet by reason of the appointments made by Van Buren, Tyler and Polk, such it remained until the Civil War. Three of the appointees of President Jackson, Taney, Wayne and Catron, all from slave states, served to the end, notwithstanding and surviving the tidal wave of secession, whose social and political forces swept into the Southern Confederacy such Whig champions of Union as John Bell, Alexander Stephens, Robert E. Lee, and their associates and followers. Taney and Catron came to the bench in the same twelve-month, and their deaths were separated by only seven months. Both were intimate and confidential friends as well as political followers of Jackson, and their association together upon the Supreme bench for nearly thirty years was peculiarly harmonious and happy.

Justice Catron from 1837 to 1865 bore his full share of the labors and responsibilities of the Court, during that long period of sectional animosity and bitterness resulting in the great Civil War. He was on the bench when the Charles River Bridge case turned back the current of vested right which had borrowed such force from the Dartmouth College case; and his opinions scattered thereafter through the volumes of Peters, Howard, Black and Wallace show the service that he rendered to have well deserved the tributes paid to his memory by his profes-

sional brethren on the assembling of court, 1865, after the jurisdiction of the Court had been resumed over the entire territory of the United States. There is not in these opinions, perhaps, the learning of his associates,—certainly there is not the show of it; but their perusal fully discloses the characteristics attributed to him by his associates.

The resolution of the bar expressed the high consideration they entertained of "the integrity, dignity, impartiality, love of justice and strong common sense, which marked his character as a judge and as a man."

Attorney-General Speed, who had practiced before him on circuit from early years, in presenting the resolutions said:

My acquaintance continually enhanced the respect and admiration with which from the first I regarded him. With the advantage of only limited education he rose easily and pleasantly to the high position he illustrated. Possessing a vigorous mind, diligent habits, earnest and honest purposes, and simple, unaffected manners, his life was one of dignity and usefulness.

Chief-Justice Chase in response thus testified the appreciation of his judicial confrères.

His brethren affectionately remember him as an upright man and an excellent judge. It is their testimony that, in the learning of the common law and of equity jurisprudence, and especially in its application to questions of real property, he had few equals and hardly a superior. He was even more distinguished by strong, practical good sense, by firmness of will, and straightforward honesty of purpose. Ever frank and earnest in the expressions of his opinions, he was yet void of desire to impose them arbitrarily on others. The candor and patience with which he

listened to argument found fitting counterparts in the impartiality and equity of his judgments. These judgments remain, and are his monument. While the records of this Court endure they will recall the memory of the just and fearless magistrate who pronounced them, and will be esteemed as valuable contributions to the jurisprudence of his country. They will command from the profession the confidence and respect which was felt for the author by his associates in the court.

We may give here only a few brief excerpts from some of those opinions which will prove his title clear to the grateful memory of his countrymen, as well as illustrate his habits of thought and style of expression.

His view of war, concurring with that attributed to General Sherman, is thus expressed in the case of *White vs. Burnley*.⁸

When one nation is at war with another nation, all the subjects or citizens of the one are deemed in hostility to the subjects or citizens of the other; they are personally at war with each other, and have no capacity to contract.

In the famous case of *Gaines vs. Relf*,⁹ while delivering the opinion of the Court that Mrs. Gaines was not the lawful heir of Daniel Clark to a large part of New Orleans, he remarks of marriage:

The great basis of human society throughout the civilized world is founded on marriages and legitimate offspring; and to hold that either of the parties could, by a mere declaration, establish the fact that a marriage was void, would be an alarming doctrine.

⁸ 20 Howard's Reports, 249.

⁹ 12 Howard's Reports, 534.

Thus tersely he states in French vs. Spencer,¹⁰ an elementary doctrine, often ignored:

Where the legislature makes a plain provision, without making any exception, the Courts can make none.

And in Bank vs. Knoop¹¹ he thus protests against an abuse of *stare decisis*:

It would be most unfortunate for any court, and especially for this one, to hold that a decision affecting a great constitutional consideration, involving the harmony of the Union (as this case obviously does), should be concluded by a decision in a case where the constitutional question was not raised by counsel; and so far from being considered by the court, was never thought of; such a doctrine is altogether inadmissible.

In Rundle vs. Canal Co.¹² we find these views in regard to the positions of the mayor and aldermen of public and the directors of private corporations:

State laws, by combining large masses of men under a corporate name, cannot repeal the Constitution. . . . My opinion is, and long has been, that the mayor and aldermen of a city corporation, or the president and directors of a bank or the president and directors of a railroad company (and of other similar corporations), are the true parties that sue and are sued as trustees and representatives of the constantly changing stockholders and members.

In denying the widow of Commodore Decatur a mandamus against the Secretary of the Treasury¹³

¹⁰ 21 Howard's Reports, 238.

¹¹ 16 Howard's Reports, 401.

¹² 14 Howard's Reports, 95.

¹³ Decatur vs. Paulding, 14 Peters' Reports, 522.

he delivered a concurring opinion, expressing the stalwart Jacksonian view of the Executive powers, in which occur the following sentences:

I maintain that the Executive power of this nation, headed by the President, and divided into departments in its administration of the finances of the country, acts independently of the courts of justice in paying the public creditors. . . . To permit an interference of the courts of justice with the accounts and affairs of the treasury would soon sap its very foundations.

Justice Catron believed in the exercise of governmental powers wherever located, whether in state or Federal Government, and he had definite views as to the limitations of these powers under our Federal system; and accordingly we find expressions like the following threading the long course of his judicial decisions:

Having the power of disposal and of protection (of the public lands), Congress alone can deal with the title, and no state law, whether of limitations or otherwise, can defeat such title.¹⁴

The framers of the Constitution never intended that the legislative and judicial powers of the general government should extend to municipal regulations necessary to the well-being and existence of the states.¹⁵

I hold that, beyond the Constitution of the United States, there is no federal government, either in the mass or in the detail. That beyond the pale and limits prescribed by that instrument, to be interpreted, not by indirect or ingenious or forced constructions, or by remote implications, but by the plain and common-sense import of its language, and language familiar to the common and

¹⁴ Jourdan vs. Barrett, 4 Howard's Reports, 185.

¹⁵ Mills vs. St. Clair County, 8 Howard's Reports, 585.

general understanding, all is unwarranted assumption and wrong — a termination of all legitimate federal power.¹⁶

But in the License cases,¹⁷ the Passenger cases,¹⁸ and the Dred Scott case,¹⁹ (that unfortunate blunder of judicial patriotism) we find Justice Catron's fullest expression of views on the complicated structure of our government and the powers of Congress, and some of the best examples of his literary style. In the first of these, involving the powers of the state to license the liquor traffic, occur the following sententious expressions:

The power to regulate commerce among the states may be exercised by Congress at pleasure, and the states cut off from regulating the same commerce at the same time it stands regulated by Congress; but . . . until such regulation is made by Congress, the states may exercise the power within their respective limits.

Until it (the article) passes from the hands of the importer, it is "an import," and belongs to regulated "foreign commerce," and is protected.

The police power of the states was reserved to the states, and . . . it is beyond the reach of Congress; but . . . such police power extends to articles only which do not belong to foreign commerce, or to commerce among the states, at the time the police power is exercised in regard to them; and . . . the fact of their condition is a subject proper for judicial ascertainment.

If the state has the power of restraint by license to any extent,

¹⁶ North Indiana Railroad Co. vs. Michigan Central Railroad Co., 15 Howard's Reports, 251.

¹⁷ 5 Howard's Reports, 608.

¹⁸ 7 Howard's Reports, 449.

¹⁹ 19 Howard's Reports, 519.

she has the discretionary power to judge of its limit, and may go to the length of prohibiting sales altogether.

And the following in the Passenger cases, testing state statutes imposing taxes on alien passengers landing in their ports:

Congress has no power to lay any but uniform taxes when regulating foreign commerce to the end of revenue — taxes equal and alike at all the ports of entry, giving no one a preference over another. Nor has Congress power to lay taxes to pay the debts of a state, nor to provide by taxation for its general welfare. Congress may tax for the treasury of the Union, and here its power ends.

The Constitution was a Compromise between all the States of conflicting rights among them. They conferred on one government all national power, which it would be impossible to make uniform in a process of legislation by several distinct and independent state governments; and in order that the equality should be preserved as far as practicable and consistent with justice, two branches of the national legislature were created. In one, the states are represented, and in the other, according to their respective populations. As part of the treaty-making power, the states are equal. The action of the general government by legislation or by treaty is the action of the states and of their inhabitants; these the Senate, the House of Representatives and the President represent. This is the federal power. In the exercise of its authority over foreign commerce it is supreme. It may admit or it may refuse foreign intercourse, partially or entirely.

The Dred Scott case invoked the following judicial epigrams:

My opinion is, that Congress is vested with power to govern the territories of the United States by force of the third section of the fourth article of the Constitution.

That Congress has no authority to pass laws and bind men's rights beyond the powers conferred by the Constitution, is not open to controversy.

Congress cannot do indirectly what the Constitution prohibits directly.

In the much mooted case of *Swift vs. Tyson*, Justice Catron delivered a brief concurring but protesting opinion illustrating not only his own judicial temperament, but also a phase of our jurisprudence often stigmatized as "judge-made law." The tradition is that Mr. Justice Story had long sought opportunity to sustain his friend Chancellor Kent and rebuke the heresies of the New York *nisi prius* judges on the rights of holders of negotiable instruments; and that, unable to restrain longer his commercial orthodoxy, he relieved his mind by the opinion in this case, against which Justice Catron thus protests:

But I am unwilling to sanction the introduction into the opinion of this court of a doctrine aside from the case made by the record, or argued by the counsel, assuming to maintain that a negotiable note or bill pledged as collateral security for a previous debt, is taken by the creditor in the due course of trade; and that he stands on the footing of him who purchases in the market for money, or takes the instrument in extinguishment of a previous debt. . . . I never heard this question spoken of as belonging to the case, until the principal opinion was presented last evening; and therefore I am not prepared to give any opinion, even were it called for by the record.

That Justices Wayne and Catron, southern Democrats, remained upon the bench and adhered to the

Union after their states had seceded, for which surprise has been expressed by some writers, was the natural result not only of the conservatism of judicial temperament and mature years, but also of their Jacksonian training and association; indeed, the wonder is, that a Jackson Democrat should have had any more favor for secession than Old Hickory had for nullification. During the sixty-five years elapsing from the day when the British subaltern scarred with his sword the freckled face of the boy prisoner for proudly and defiantly refusing to perform menial service for the petty tyrant, on through all his stormy life, until the old hero, worn out in the military and political service of his country, laid his tired body to rest at the Hermitage, and surrendered his proud spirit to his Maker, Jackson was the constant and unchanging incarnation of American loyalty, never swerving in word or act by so much as a hair's breadth in his devotion to that sentiment, for which he is best known, and with which he inspired his fellow-citizens and followers always and everywhere: "The Federal Union, it must be preserved!"

This sentiment animated John Catron, and he gave his influence to the preservation of an unbroken and indissoluble Union; and, having lived to see the war-smoke clear away, happily departed before the ensuing political cloud, more portentous and deplorable even than Civil War, had yet blackened the southern horizon.

He saw at his home in the border states what he

had warned his fellow-citizens would come,—what the people of the North and of the farther South never saw or felt, the armed hand of neighbor against neighbor, brother against brother, and son against father raised in mortal combat; and he used all his influence to soften the asperities and assuage the horrors of the civil strife. He befriended alike, both Federal and Confederate, and prayed without ceasing that the end might come, and men resume their reason; and he lived to see the answer to his prayers. And on that May day of 1865, for a long while thereafter devoted to the decoration of Federal graves, now happily to all, both Federal and Confederate, with "love and tears for the blue and tears and love for the gray," this valiant, loyal, Christian soldier, in the eighty-fifth year of his age, gave up this mortal life to enter upon the life immortal.

When the history of our great Civil War is fully written it will contain a chapter pregnant in praise of that class to which Justice Catron belonged, the most troubled and aggrieved of all, the Union men of the South, who, in the soul-struggle between their property interests, personal friendships and ties of home and blood on the one side, and their patriotic sentiments and convictions on the other, were constrained to sacrifice the former, and cling to the Union of the States, as the greatest of all earthly blessings to America and humanity.

THOMAS RUFFIN.

THOMAS RUFFIN

From a painting by William Carl Brown, in the Supreme Court Room
, at Raleigh. The original painting is a full-length portrait.



THOMAS RUFFIN.

1787-1870.

BY

WALTER CLARK,

Chief-Justice of North Carolina.

THE hunter in the Indian jungle discovers by unmistakable signs when the king of the forest has passed by. So the lawyer who turns over the leaves of the North Carolina Reports, when he comes upon the opinions of Thomas Ruffin, instantly perceives that a lion has been there.

Thomas Ruffin, the eldest child of his parents, was born in King and Queen County, Virginia, November 17th, 1787. His father, Sterling Ruffin, was a very zealous and a very pious minister of the Methodist church. His mother, Alice Roane, was of a family much distinguished in Virginia by the public services of many of its members. She herself was cousin-german to Chief-Justice Spencer Roane of the Supreme Court of that state. Thomas Ruffin spent his early boyhood on the farm in Essex and attended neighborhood schools. His father sent him at a suitable age to a classical academy in the beautiful and healthful town of Warrenton, North Carolina, taught by Marcus George, an Irishman, and a

teacher of high reputation. Among his schoolmates there were Cadwallader Jones and Weldon N. Edwards. From this academy he was transferred to Nassau Hall, Princeton, New Jersey. His father, who was a deeply pious man, was controlled, it is said, in the selection of this College in preference to William and Mary and other colleges then popular, by a desire to secure him as much as possible from the usual temptations of college life by placing him in an institution whose reputation for the maintenance of authority and discipline stood high as it did at Princeton. Young Ruffin graduated there in 1805, being sixteenth in a class of forty-two members. Governor James Iredell was his roommate; and among his college friends and contemporaries who afterwards achieved prominence were Samuel L. Southard and Theodore Frelinghuysen, of New Jersey; Joseph R. Ingersoll, of Philadelphia; Stevenson Archer, of Maryland, and many others who became prominent in public life. On his return home he entered the law office of Daniel Robertson, Esq., in Petersburg, and remained with him during 1806 and 1807. Here he had as fellow-students Winfield Scott, afterwards the hero of Lundy's Lane and Mexico, and John F. May, later a Virginia judge of note. Mr. Robertson was a Scotchman by birth, a learned scholar and advocate, who gained high distinction as a lawyer. He reported the debates in the Virginia Convention which adopted the Federal Constitution and the trial of Aaron Burr for high treason.

In his autobiography General Scott refers to subsequent occasions when he had met Judge Ruffin especially in Washington in the spring of 1861, when the latter was serving as a member of the celebrated Peace Congress; and he expresses the opinion that "if the sentiments of this good man, always highly conservative (the same as Crittenden's) had prevailed, the country would have escaped the sad infliction of the war."

Reverend Sterling Ruffin, his father, having suffered financial reverses, removed to Rockingham County in 1807, and his son soon followed. He continued his studies in the law office of Judge Archibald D. Murphey, and was admitted to the bar in 1808. He located in Hillsboro, and on December 9th, 1809, married Miss Anne Kirkland of that town, the daughter of William Kirkland, a prominent merchant, and a leading citizen. In 1813, 1815 and 1816 he was a member of the House of Commons from the borough of Hillsboro, which was one of the six towns which, following the English custom, continued to send representatives until the adoption of the amended Constitution in 1835. In 1816 he was Speaker of the House. In 1815 and 1816 the town of Hillsboro was represented by Judge Ruffin and the county of Orange by Judge Murphey in the Senate, and Judge Nash in the House. It is said that on first coming to the bar Judge Ruffin's efforts at argument were diffident, and his speech hesitating and embarrassed. His friends candidly advised

him to abandon the profession, but he felt that he had the "root of the matter" in him and held on. He was well-grounded by his studies in a knowledge of the law, and experience soon cured his defects of speech. At a strong bar he soon became a leader, and seven years later, in 1816, while Speaker of the House, he was chosen a judge of the Superior Court, at the early age of 29, to fill the vacancy caused by the resignation of Duncan Cameron. This position he resigned after two years on the circuit, and returned to a lucrative practice at the bar. He was an indefatigable student, and a frame of iron permitted him any amount of application. For forty-three weeks of the year he had engagements in Court which he kept regardless of weather and bad roads. He was also for one or two terms reporter of the Supreme Court, but was compelled to relinquish the position by the demands of his practice. His work as reporter will be found in the first part of the 8th volume of *North Carolina Reports*¹ (I Hawks). In the summer of 1825, upon the resignation of Judge Badger, he again accepted the position of judge of the Superior Court, and during the next three years he administered its duties in such a manner that he was generally designated by public opinion for the succession to the Supreme Court upon the occurrence of the first vacancy. In 1824 he was a candidate upon the electoral ticket in favor of William H. Crawford for President.

In the fall of 1828 the stockholders of the State

Bank of North Carolina, at Raleigh, at whose head were William Polk, Peter Browne and Duncan Cameron, in view of its embarrassments and threatened litigation, prevailed upon him to take the presidency of the bank with an increased salary and with the privilege of practicing his profession. He again resigned his judgeship and accepting the offer, by his diligence and practical business knowledge and the faith imparted by his acceptance of its headship, he effectually reinstated the bank in public confidence, and relieved it of its embarrassments. About this time, there being a vacancy in the United States Senatorship by the appointment of Governor Branch to the head of the Navy Department, he was solicited to become a candidate for the vacancy, with strong prospects of success. This he declined, saying as he often did, that "after the labor and attention he had bestowed upon his profession he desired to go down to posterity as a lawyer." While employed in the affairs of the bank he still remained in full practice at the bar, and his reputation as a lawyer suffered no eclipse. On the death of Chief-Judge Taylor in 1829, Governor Owen appointed to the Supreme Court Judge Toomer, a lawyer of deserved eminence in the profession, and of a singularly pure and elevated character; but public opinion and the sentiment of the bar had so decidedly marked out Judge Ruffin for the succession that when the legislature met in the fall of that year he was elected to the position.

Upon the death of Chief-Judge Henderson in

1833, Judge Ruffin was elected Chief-Justice by his associates and served as such nineteen years. In the autumn of 1852, while at the height of his fame and not yet oppressed by the weight of years, he resigned his office, intending to retire forever from the profession and the studies in which he had won renown. But in 1858, on the death of his friend and successor, Chief-Justice Nash, he was called by the almost unanimous voice of the legislature, though in his seventy-second year, to resume his place upon the Supreme Court bench. This he did but did not insist upon resuming the Chief-Justiceship which went to Judge Pearson. After somewhat more than a year's service his failing health made his duties irksome, and he resigned a second time and retired finally from judicial life. It is his singular fortune to have resigned twice from both the Superior Court and Supreme Court bench. It is worthy of note, too, that in 1848 all three of the Supreme Court judges (Ruffin, Nash and Battle), the Governor (Graham) and one of the United States Senators (Mangum) were from the single county of Orange. Already, from 1845 to 1848, two of the Supreme Court (Ruffin and Nash), the Governor (Graham) and one United States Senator (Mangum) had been from that county; while at the legislature of 1841 both United States Senators (Graham and Mangum) were elected from the same county of Orange, in which the Chief-Justice also then resided. From 1852 to 1858 two of the three Supreme Court judges were again from

Orange, as two out of the three (Smith and Merimon) were from Wake from 1883 to 1889. In the latter year the number of judges was increased to five. Thus in our state geographical considerations had small weight in the selection for non-political offices in which fitness alone is of importance.

"It may also be noted, in this connection, that in 1815 the Governor (Miller) both United States Senators (Macon and Turner) and Judge Hall were from the same county—Warren. It is a singular coincidence that the two United States Senators, Macon and Turner, had served together in the Revolutionary War as privates in the same company, in Colonel Hogun's Seventh North Carolina Regiment of the Continental Line. There is probably no parallel case in the history of the Senate."

During the six years between Chief-Judge Ruffin's resignation in 1852 and his reëlection in 1858, and again after his second resignation in 1859, he accepted the office of justice of the peace in Alamance county, to which he had then removed, and held the county court with the lay justices as their presiding justice. Another most eminent lawyer, Thomas P. Devereux, the author of Devereux's Reports, having retired from the bar upon falling heir to a princely fortune, discharged the same duty for years as presiding justice of the peace in the county court of Halifax; and George E. Badger, ex-United States Senator and ex-judge, presided in the same manner as a justice of the peace in Wake County. The law

is well said to be a jealous mistress; but Judge Ruffin took an intelligent and practical part in stock raising, orchards and agriculture. During the recess of his courts for thirty-five years, while at the bar and on the bench as well as after his retirement from both, he found recreation in these pursuits, especially in the rearing of live stock and in the improvement of breeds. It was no mere compliment to a distinguished citizen when the Agricultural Society of North Carolina in 1854 elected him to its presidency, but a tribute to his expert knowledge of that art which the society had been organized to promote. He was also one of the soundest and ablest financiers in the state. We have already seen the demand for his services as President of the leading bank in the state, and his success in restoring its prestige and credit.

By his industry, frugality and capacity for the management of property, he accumulated a large estate. He owed little of it to his profession; for soon after he had achieved a lucrative practice he was called to the bench, on which, notwithstanding four successive resignations, he spent the greater part of his active life, receiving the moderate salary attached to the judicial office in North Carolina.

Until superseded by the changes in 1868, he had been for many years the oldest Trustee of the State University, and took an active interest in promoting its welfare. For more than forty years a communicant of the Protestant Episcopal Church, he was one

of its most active members in this state and more than once represented the Diocese in the Triennial General Convention.

After the failure of the "Peace Conference" of 1861, as to which President Buchanan adds his testimony to that of General Scott, that the voice of Judge Ruffin was for peace, he accepted a seat in the State (Secession) Convention of 1861. When war began, his influence was for its earnest and zealous prosecution. When defeat at last came he yielded an honest submission, and in good faith renewed his allegiance to the government of the United States. After the war he sold his farm and returned to Hillsboro, where he died January 15th, 1870, after an illness of about four days in the eighty-third year of his age. He raised a family of thirteen children. One of his sons, Thomas Ruffin, Jr., became a judge both of the Superior and Supreme courts. The companion of his life, a bride at fifteen, and a wife for more than sixty years, survived him many years, to receive the love and affection of her numerous posterity and the homage of a wide circle of friends.

As an advocate, Chief-Judge Ruffin was vehement but logical. He placed small reliance on rhetoric and appeals to the imagination. His mind was broad, analytic and grasping. He was physically and mentally capable of vast application, and he did not spare himself any amount of labor. Indeed of him it was true, "*Labor ipse est voluptas.*" He was in the habit of exercising his mental faculties by daily

going over the demonstration of some theorem in mathematics. He reached greatness like most great men (especially lawyers), not by the sudden sweep of an eagle's wing, but

While others slept
He toiled upward in the night.

His capacity as a business man was shown in the executive talent displayed by him on the Superior Court bench, where there is full scope for it, and in which particular the occupants of that bench are more often lacking than in the knowledge of law. In administering the criminal law upon the circuit, the extent of punishment depends very largely upon the discretion of the judge. Judge Ruffin's sentences while not cruel were such as to be a terror to evildoers. His practical mind saw that punishment was not vengeance visited upon the criminal, nor was it intended to be reformatory, but rather an example to deter others from the commission of offences, and that the protection required for law-abiding men was to prevent violations of law by fear of punishment. He was no sentimentalist. He knew that the investigation and the punishment of crime were expensive to the good men of the community, and by the nature of his sentences he left no doubt of his intention to fulfil the purpose of the statute by visiting offences against law with unpleasant consequences to the evildoer. Consequently whenever he rode the circuit crime decreased. He sat upon the Supreme Court bench twenty-three years consecutively, from 1829

to 1852, during nineteen years of which he was Chief-Justice. During the last part of his life he again occupied a seat on the bench for a year and a half. His opinions thus covered nearly a quarter of a century, and will be found in thirty-five volumes, from 13 to 45 North Carolina Reports inclusive, and also in the same reports volumes 51 to 57. He wrote while on the bench more opinions than any other judge. His opinions embrace almost every topic of the civil and criminal law. They are usually long, full, and show the concentration of a powerful mind upon the subject in hand. His opinions are well beaten out. The print of the hammer is there. They have been cited with approbation by the Federal and State Supreme Courts, by eminent text-writers, and have been quoted as authority in Westminster Hall. He reached the rare distinction of being equally great both in the common law and as an equity lawyer. Chief-Justice Pearson, his immediate successor, probably equaled him as a common-law lawyer, but fell far short of him in the grasp and application of the great principles of equity.

While conservative as lawyers and judges necessarily are, he was not a Chinese copyist of "things long outworn." Where the changed condition of things in this country as compared with England, or improved modes of thought, or "the better reason" called for a modification of precedent, he did not hesitate to declare it. In the criminal law he was above the pettiness of word-splitting and obeyed the

will of the legislature,—so often expressed in enactments previously slighted by the courts,—that technicalities should be disregarded by the judge when not of the substance of the issues involved. In *State vs. Moses*¹ he construed the statute to mean that all the defects and omissions in indictments are cured, except the omission of an averment of matter essential to constitute the crime charged. This certainly was the intent of the law-making power. He says:

This law was certainly designed to uphold the execution of public justice, by freeing the court from those fetters of form, technicality and refinement which do not concern the substance of the charge and the proof to support it. Many sages of the law had before called nice objections of this sort a disease of the law and a reproach to the bench, and lamented that they were bound down to strict and precise precedents, neither more brief, plain, nor perspicuous than that which they were constrained to accept. In all indictments, especially those for felonies, exceptions extremely refined, and often going to form only, have been, though reluctantly, entertained. We think the legislature meant to disallow the whole of them, and only require the substance; that is, a direct averment of those facts and circumstances which constitute the crime to be set forth.

In 1796 the legislature of North Carolina amended the common-law rule by prohibiting judges from expressing an opinion on the facts. The example has been followed in only a very few States, and the common-law rule still prevails in the Federal Courts and in most of the state courts, as well as in all other English-speaking countries. In this same case Judge

¹ 13 North Carolina Reports, 452.

Ruffin takes his stand against the extension of the purport of this statute by judicial construction, and says:

The administration of the law would be more certain, its tribunals more revered, and the suitors better satisfied, if the judge were required (as formerly) to submit his views on the whole case, and after the able and ingenious but interested and partial arguments of counsel, to follow with his own calm, discreet, sensible, and impartial summary of the case, including both law and fact. Such an elucidation from an able, upright, learned and discreet magistrate, habituated to the investigation of complicated masses of testimony, often contradictory, and often apparently so, but really reconcilable, would be of infinite utility to a conscientious jury in arriving at a just conclusion, not by force of the judge's opinion, but of the reason on which it was founded, and on which the jury would still have to pass. If this duty were imposed on the judge, it is not to be questioned that success would oftener than it does depend on the justice of the cause, rather than the ability or the adroitness of the advocate.

During his service on the bench two notable departures were made from the English precedents in equity, simplifying our system and freeing it from embarrassments: (1) Adhering to the Statute of Frauds, and refusing to decree specific performance of a verbal contract of sale of land upon part performance: (2) Discarding the doctrine of vendor's lien upon land sold upon credit.² There were also other salutary reforms, since recognized and acted on by many able courts, in support of which Chief-Judge Ruffin delivered strong and convincing arguments. His familiar knowledge of affairs especially

² *Womble vs. Battle*, 38 N. C., 182.

with banking and accounts, and his practical knowledge of our many-sided, every-day life was of great advantage to him on the bench. He was, as Tennyson says of Wellington, "rich in saving common-sense."

In *Shaw vs. Morrison*,³ he laid down the doctrine, since followed in every state but one,⁴ that on an indictment for retailing liquors without license, the burden is on the defendant to show the existence of a license. His opinion in *Hoke vs. Henderson*,⁵ had the opposite fortune of being followed by none. In that case it was held that an officer has an estate in his office, and though the legislature may destroy the office (when not prohibited by the Constitution) yet it cannot continue the office, and transfer the estate in it to another. It was the first in the Country upon the subject and led to results which he could not have contemplated. The United States Supreme Court and all other State Supreme Courts which have had to pass upon the question have held since very properly of course, that office is not property. In 1868, when the change from an appointive to an elective judiciary took place in this state the decision in *Hoke vs. Henderson* was treated as a nullity by the new judges, who took their seats upon the bench without scruple or hesitation, but singularly enough the same judges a few years later, extended it to deny the

³ 14 North Carolina Reports, 299.

⁴ Black on "Intoxicating Liquors," p. 507.

⁵ 15 North Carolina Reports, 1.

power of the legislature to deal with any office except to abolish it absolutely. Nearly thirty years later the majority of the court further extended the doctrine leading practically to a judicial veto upon any legislation concerning offices. This was not contemplated by the authors of the original decision, who besides had not the benefit of the decisions of other courts upon the point. This dangerous anomaly has since been overruled, *Mial vs. Ellington*,⁶ and this state does not now stand solitary and alone, as before, by asserting a judicial veto upon legislation concerning offices, which being political is clearly a matter solely for the Legislative Department to deal with.

In *State vs. Benton*,⁷ Chief-Judge Ruffin established clearly the practice as to trials for homicide and challenges to jurors. In *Railroad vs. Davis*,⁸ he laid down the doctrine (then a new one) of the right of the Legislature to provide for condemnation of a right of way for railroad purposes, and that in such cases the land-owner did not have a constitutional right to a trial by jury to assess the damages but was remitted to whatever mode of assessment might be provided by the Legislature and that payment of compensation did not necessarily precede the taking possession of the right of way. In *Irby vs. Wilson*⁹ in a very able opinion he maintains that while the domicile of the husband is that of the wife for some

⁶ 134 North Carolina Reports, 131.

⁷ 19 North Carolina Reports, 131.

⁸ 19 North Carolina Reports, 452.

⁹ 21 North Carolina Reports, 568.

purposes, yet where they have adverse interests, as in a suit between them, her domicile is where she actually resides; and that hence in an action for divorce, where the wife had left the state for many years, a decree of divorce obtained by the husband in the state where he continued to reside, without actual service upon the wife is a nullity. In *Webb vs. Fulchire*¹⁰ is laid down the proposition that where a man is cheated out of his money, though it is in playing at a game forbidden by law, he may recover back what he has paid from the person who practiced the fraud upon him. The game in this case was "three-card monte," and the learned Judge seems as much puzzled as to how the trick was worked as the simple-minded plaintiff himself. *State vs. Rives*¹¹ is a very interesting decision, which holds that while the interest of a railroad company in its right of way can be sold under execution, the corporate franchise is not liable to such sale. In *Attorney-General vs. Guilford*,¹² is discussed a subject which has been often since a *vexata questio* in this state, and the Chief-Justice holds therein that the county authorities are not bound to grant license to retail spirituous liquors to every one who proves a good moral character, nor have they on the other hand, the arbitrary power to refuse at will all applicants for license if properly qualified; and further, that the county authorities having a discretion to a

¹⁰ 25 North Carolina Reports, 485.

¹¹ 27 North Carolina Reports, 297.

¹² 27 North Carolina Reports, 315.

certain extent in granting such licenses a mandamus will not lie to compel them to grant a license to any particular individual, though he may have been improperly refused a license, the only remedy, if the license is perversely and obstinately denied, being by indictment. Apropos of this, counsel for the applicant to retail, in one of the recent cases in this state observed with much naïvete that he did not understand the object of this requirement, and that he did not see why a man needed a good moral character to qualify him to sell intoxicating liquors. *Fleming vs. Burgin*,¹³ maintains the proposition that actual notice of an unregistered incumbrance does not affect a subsequent incumbrance or purchase for value which by statute is now true of any conveyance.

In *State vs. Boyce*,¹⁴ is a very interesting discussion of the right of the owner of slaves to permit them to meet and dance on his premises on Christmas eve and other holidays without being responsible for keeping a disorderly house. He says:

We may let them make the most of their idle hours, and may well make allowances for the noisy outpourings of glad hearts, which Providence bestows as a blessing on corporal vigor united to a vacant mind. . . . there was nothing contrary to morals or law in all that, adding as it did to human enjoyment, without hurt to any one unless it be that one feels aggrieved that these poor people should for a short space be happy at finding the authority of the master give place to his benignity, and at being freed from care and filled with gladness.

¹³ 37 North Carolina Reports, 584.

¹⁴ 32 North Carolina Reports, 536.

It may be not improper to recall this anecdote of his career on the Superior bench. Two persons disputing about a matter of law laid a wager on the point and one brought an action against the other to have the correctness of his opinion determined. After the contract of wager had been shown, the plaintiff rested. Judge Ruffin called on counsel for the plaintiff to prove that he had won. The counsel replied that that depended on the point of law which he submitted to his Honor. The judge replied that that was one of the facts in the case, on which he was forbidden to express an opinion, and added that for their trifling with the court he would dismiss the action, adjudging each party to pay his own costs and intimating that it was leniency for the court to go no farther. One recalls in this connection the attempted trial of a wager before Lord Loughborough, whom Campbell reports as saying:

Do not swear the jury in this case. Let it be struck out of the paper. I will not try it. It is an insult to the administration of justice. It is a wager as to the mode of playing an illegal, disreputable and mischievous game called Hazard whether allowing seven to be the main and eleven to be a nick to seven, there are more ways than six of nicking seven on the dice. I will not submit to the degradation of trying such a question — a question *after all, admitting of no doubt* and capable of mathematical demonstration.

In political opinions he was a follower of Jefferson; but this did not prevent his reverence for Chief-Justice Marshall, who was his personal friend, as was

also Chancellor Kent. He was succeeded as judge by Battle (on Battle's second call to the Supreme Bench), and as a Chief-Justice by Nash, both from his own county of Orange.

Take Chief-Justice Ruffin all in all we have not seen "his like again." By the consensus of opinion and beyond all debate he is by much the greatest judge who has ever sat upon the bench in North Carolina. Should any one be found who may deny him this honor, he will admit at least that Ruffin has had no superior.

**THOMAS ALEXANDER
MARSHALL.**

THOMAS ALEXANDER MARSHALL.*

1794-1871.

BY

MORRIS WOLF,

of the Pennsylvania Bar.

IT is one of the penalties of being a judge in an appellate court that the manifestation of individuality becomes a fault. The personal equation must be eliminated, at least in the composition of an opinion, and the opinion is excellent in proportion as it is the result of almost mechanical logic. When, therefore, one reads the decisions of an able jurist, one must recognize with some regret that one can not expect to find therein any key to the character or temperament of the writer. We may go carefully through every one of the many hundreds of opinions which Thomas A. Marshall wrote, and when we have finished our task, we shall be without a single *datum* on which to base an estimate of his mind or heart or from which to draw any inference as to his life or achievements. In a measure they seem entirely detached and impersonal,—opinions which might have

* An extended and careful investigation has failed to locate an authentic portrait of the subject of this essay.—ED.

come from the pen of any cold logician of any time or place,—and it is doubtful whether the peculiar mental and emotional equipment of the man or the stirring historical environment in which he lived, influenced in the slightest way the work which he did.

Marshall was born near Versailles, Kentucky, in 1794, less than two years after that state had been admitted to the Union. He had chosen his family well. His father was the famous Humphrey Marshall, United States senator and historian, to whom Thomas proved a grateful and devoted son in the dark days when misfortune swept away the value of the elder Marshall's vast landed estates, and made him dependent for support on his illustrious son. Mrs. Humphrey Marshall, his mother, was a sister of John Marshall, the great Chief-Justice of the United States Supreme Court, and of Alexander K. Marshall, at that time one of the best known lawyers in Kentucky. Mrs. Marshall was a woman of great culture and amply able to assume the direction of Thomas's early education. He studied history and literature with her and was instructed in mathematics and the classics by the best teachers in Kentucky. He graduated from this home training when eighteen, and was sent to Yale after a year at the college in Lexington, Kentucky. He finished his course at Yale in 1815 and returned to Kentucky. After a year's study, Marshall was admitted to the bar in Frankfort, and a few days later he married Miss Eliza Price, said to have been the most beautiful woman in the state. If we

remember that Miss Price was a niece of Henry Clay we shall understand why Marshall so consistently supported the great Kentuckian, even in the days when the latter temporarily lost the confidence of the people of his state by supporting Adams for the Presidency in opposition to Jackson, the popular idol. In 1819 family considerations induced Marshall to move to Paris, Kentucky, and for twelve years he devoted himself to the practice of the law there.

It would have been little to his credit, however, had Marshall put his mind entirely on his law work, for there transpired during those years from 1819 to 1831 public events in which every loyal Kentuckian had a deep interest. From 1818 to 1825 the state had been struggling with financial problems. The rapid growth of manufactures and of agriculture had led to a demand for a better system of currency than had previously existed, and moving along the line of what seemed an easy remedy, the Legislature chartered simultaneously forty-six new banks, which were intended to supply the demand for a medium of exchange. For a few months they flourished, but then they collapsed, leaving the community to pay the penalty of the wild speculations which the banks had encouraged. Hopelessly in debt, the people looked about for another expedient, and the chartering of the Bank of the Commonwealth, with power to issue three million dollars of paper, which was made a legal tender for all debts, was deemed an excellent

solution of the difficulty. The miracle of water from the rock was not repeated, however, and the paper of the Bank of the Commonwealth was not transmuted into value by the legislative fiat. It speedily depreciated, and creditors refused to accept it in payment of their debts, claiming that the Act which made it legal tender was, as to preexisting debts, unconstitutional, because it impaired the obligation of the contracts which they had made with their debtors. The question of the constitutionality of the Act came up before the Court of Appeals. Excitement was tremendous, and the judges were threatened with personal violence in case they should not relieve the indebted public by upholding the Act. But the judiciary, unmoved as it has been at almost every crisis of American history, fearlessly pronounced the Act invalid.¹ The so-called relief party, initiating a method adopted at a later day to overcome a similar decision of the Supreme Court of the United States, went about securing a body of judges more favorable to its views. The election of 1824 gave the relief party a Governor and a majority of each House of the Legislature. With these advantages, no time was lost in passing the Acts of December 12th, 1824² and January 6th, 1825, repealing the Acts organizing the existing Court of Appeals, and providing for its reorganization with new judges appointed by the Governor. Among the adherents

¹ Blair vs. Williams, 4 Littell's Reports, 34 (1823).

² Quoted in 2 T. B. Monroe's Reports, III.

of the anti-relief party, this tyrannical interference with the Court aroused a storm of indignation, and mass-meetings were held throughout the state to condemn the Reorganizing Acts. It was at the meeting held for that purpose in Paris that Marshall made his first public appearance. He there proposed, and delivered a speech in favor of, resolutions strongly denouncing the Acts. A reaction of public opinion soon after brought about their repeal,³ and Marshall was rewarded for his activity by an election to the General Assembly. This experience whetted his appetite for a political career, although if we may believe a standard tale, his ambitions in that direction had existed since childhood. According to this story, when Marshall was a boy he had spent some time at Washington with his father, who was a United States senator. One day he climbed up one of the huge posts in the vestibule of the Capitol, and wrote his name on it. Rather strangely, he seems to have chosen for this not altogether meritorious work, a time when other visitors were about. One of them asked the youngster what he was doing, and he was told, "I am writing my name, and I want to see if it will be here when I come to Congress." Whether the desire to go to Washington had been cherished so long or not, it is certain that Marshall sought the nomination for Congress in 1828. He was unsuccessful in this attempt, but was

³ By act of the 30th of December, 1826, quoted in 3 T. B. Monroe's Reports, 111.

reëlected to the General Assembly. For the next few years he took a deep interest in politics, and in 1831 he was elected to Congress on the anti-Jackson ticket, and, at the expiration of his term in 1833, was reëlected. It is very difficult to say what effect this political activity had on Marshall's law work. On going through the reports of the decisions of the Court of Appeals one does not meet Marshall's name as counsel in many of the important cases, it does not appear on the list of attorneys admitted to practice before the Court of Appeals as reorganized under the Acts of 1824 and 1825,⁴ and from the scanty information which can be obtained, one imagines that his appointment by Governor Morehead in 1835 as a Judge of the Court of Appeals, was a tribute, more to the influence of his family and his own political services, than it was to his legal ability, although the fact that from 1836 to 1850 Marshall was engaged as a professor of law at Transylvania University, then the pride educational institution of the west, is strong evidence that he had acquired a reputation in his profession before his promotion. In reading the reports of the cases decided during his service on the bench, it does seem as if he developed his acute perception after he became a judge. His later opinions are distinctly better than his earlier ones both in form and substance. Of course there is this to be said: when Marshall was appointed to the Court of Appeals, his associates were men of more than ordinary

⁴ Published in 2 T. B. Monroe's Reports, 115.

ability, particularly Chief-Justice Robertson, and they wrote most of the important decisions for some time after Marshall obtained his appointment. While, therefore, it is true that he was a member of the Court from the time that the decisions reported in 3d Dana were given, it is necessary to go down to the volumes from 7th or 8th Ben Monroe to find the opinions which justify the fame which Marshall achieved.

The appointment in 1835 was only a pro tem. commission, but the next year Marshall was nominated regularly, confirmed by the Senate and again commissioned. A bill to increase the salaries of the judges of the Court of Appeals being about to be introduced, all of the judges resigned, but after the passage of the bill, they all were renominated, reconfirmed and recommissioned. In 1842 Chief-Justice Robertson resigned, and in 1846 his successor in that office, Ephraim M. Ewing, resigned. Marshall was next in the line of promotion, and Governor Owsley appointed him Chief-Justice.

Meanwhile a dissatisfaction at the method of choosing the judiciary had begun to make itself felt. Under the Constitution of 1799 all of the judges were appointed by the Governor. The system had worked out all right in practice, but it was regarded as inconsistent with correct theories of government, and the Constitutional Convention which met in 1849 proposed an amendment by which all of the judges were made elective by the people. The amendment

was adopted, and the state was divided into four districts from each of which one member of the Court of Appeals was to be selected. This necessitated an election, and Marshall is said to have been reluctant to run, feeling that after fifteen years spent in the cold isolation of an appellate tribunal, he was not likely to be able to secure sufficient popular support to be elected in opposition to men more closely in touch with the voters. He was induced to run however, and at the election in May, 1851, was elected from the Second District by a heavy majority. In his home county of Woodford out of an entire vote of less than one thousand his majority was over seven hundred. In accordance with the Act constituting the Court, the four judges drew lots for the various terms, and Marshall drew the five-year term, James Simpson becoming Chief-Justice. In 1854 Marshall became Chief-Justice for the second time. His term coming to an end in 1856, he went back to Frankfort where he had been admitted to the bar, and to work again, frequently appearing as advocate before the Court of which he so long had been a member. In 1859 he moved to Louisville and in 1863, 1864 and 1865, was chosen by that city as its representative in the state Legislature. In 1866 Marshall celebrated his golden wedding, the anniversary being made the occasion for a great ovation to him. The same year he was the recipient of two notable honors. His old University, Yale, bestowed on him the degree of Doctor of Laws, and Chief-Justice Simpson

having died during the winter session of the Court of Appeals, the Governor appointed Marshall to fill out his term. This was the third time that Marshall was Chief-Justice of the Court of Appeals of Kentucky. During the summer of 1866, his term expired, and he returned again to private life. Marshall was now an old man, more interested in the success of his distinguished sons than in his own future. On April 16th, 1871, he died, and was buried in the cemetery at Lexington, close by the tomb of Henry Clay.

There is little material extant upon which to base an estimate of Judge Marshall's personality. He is said to have united to the well-balanced mind which dictated his decisions, the artistic temperament which resulted in his thorough mastery of the violin and in fairly successful attempts at poetical composition. He is said to have been an exceptionally clear and convincing speaker, but to have been sensitively repugnant to making attempts to secure popular applause. The decisions which he gave on marital questions, all indicating the strongest belief in the advisability of refusing to permit divorce, perhaps were influenced by the harmony of his own married life. Because of the happiness of his home and because of his delicate health, he led a retired existence, and is said to have been rather serious even in his social relaxation. His decisions do not contain a spark of humor. He can discuss so comical a situation as that of a widow suing for breach of marriage, alleg-

ing in her statement a promise on her part to marry the defendant, but none on his part to marry her, in these grave words:⁵

It is not sufficient that there should be a promise on the part of the male — there must be mutual promises. Where the promise or offer of the male has been proved, it has been held that the mutuality of the promise or engagement may be proved by showing that the female demeaned herself as if she concurred in and approved of his promise or offer.

The one thing that all of his decisions do illustrate is a strong desire for practical justice in every case. One can not but feel that in every case he looks through the pleadings before him to the flesh and blood persons concerned, and that he passes judgment on them. The litigants are to him not mere algebraic symbols, but men and women with human feelings. He does not therefore simply bring them up and see if they fit the conditions from which a predetermined legal result must follow; he molds the result about the parties. We do not mean to infer that Marshall adopted views not sanctioned by the decided cases, but mean to emphasize his ability to interpret decided cases in such a way as to sanction the views which he wished to adopt. The consequence is that one is convinced that the wicked have been punished and the good rewarded each time, and that the technicalities of the law have not operated to bring about results which the judgment does not approve as just. It must be remembered, too,

⁵ Barnham vs. Cornwell, 16 Ben Monroe's Reports, 284 (1855).

that Marshall was not restricted by the vast mass of precedents which hem in a modern judge. There were but few reported cases in Kentucky in his time, and if no authority was contained in them, the courts rarely went farther than the Virginia or New York reports, except on technical questions of real estate law, when of course the English cases could not be ignored. Kent was a recognized authority, and his commentaries are quoted time and again in the cases.

Another reason why Marshall's decisions are such satisfactory reading is that he is at such pains to take up and answer each argument advanced by either litigant. One cause of this care probably is the social intimacy between Marshall and the comparatively small number of attorneys who practiced before him. Knowing them so well, he tried in his decisions not merely to accomplish a correct solution, but to convince the parties and their counsellors that the solution was correct. This argumentative style gives his opinions an especial value, because it shows the reasoning on which they are based. Then again the custom of asking for a rehearing in almost every case, led the Court to set out its views at length in order to show counsel that none of the points suggested by them had been overlooked. In all the years that Marshall was on the bench, he did not grant a single rehearing.⁶

⁶ See the pathetic complaint of Squire Turner, one of the best known of the Kentucky lawyers, in *Gates vs. Kennedy*, 3 Ben Monroe's Reports, 167 (1842). "This hope (of obtaining a re-hearing) is not

That the quantity of litigation was great may be seen by considering that the great number of cases reported is but a small part of those decided, the Legislature having made the very sensible law that only cases of particular novelty or importance should be reported. Indeed, the immense number of cases for a time completely choked the courts, and there are many conspicuous examples of the slowness with which the work was done, as, for instance, in McElroy vs. Wathen,⁷ where the bill was filed in 1826 and the final decision not given until 1842, and Bank of United States vs. Leather's Administrator,⁸ where the suit was instituted in 1834 and not decided finally until 1848.

It must be admitted that of the hundreds of cases which Marshall decided, few have become what can be called "leading cases." His opinions are reported in the volumes from 3 Dana's Reports to and including part of 17 Benjamin Monroe's Reports and the nine unimportant cases in which he wrote the decisions when he became Chief-Justice for the third time, in 1866, can be found in 2 Duvall Reports. Few of his decisions are brilliant or striking, but the reason that they are not quoted more is because of the difference between the character of the questions which arose in his time and those which come before our tribunals now.

founded on a rash confidence nurtured by former success in petitioning — because the Court has, without exception, overruled all I ever filed."

⁷ 3 Ben Monroe's Reports, 135.

⁸ 8 Ben Monroe's Reports, 126.

The most fruitful source of litigation while Marshall was on the bench was the wretched system by which land was appropriated. Kentucky was settled of course much later than the sea-board states and it was desirable to encourage colonization by affording settlers every facility for obtaining land. Instead, therefore, of having governmental surveys made, and ground patented in accordance with them, in such manner as to prevent interferences, the settlers were permitted to survey for themselves any piece of ground which they desired, of any size or shape, and upon filing their survey, to obtain from the land-office a warrant for the ground. No account was kept of land for which warrants were issued, and the Court of Appeals, in Beeler vs. Coy,⁹ refers to "the notorious fact that a great portion of the land in the state had been patented more than once."

On this subject Marshall delivered the very important decision in *Gossum vs. Sharp's Heirs*,¹⁰ holding that where a county court had granted a patent for certain land to a man who had improved it, the fact that the improvement made was not such a "settlement" as justified the court in granting the patent, could not be taken advantage of by a subsequent settlor who knew of the improvement and of the patent.

The record of this Court and the history of the country render it too certain that both errors and impositions have been com-

⁹ 9 Ben Monroe's Reports, 312 (1848).

¹⁰ 7 Dana's Reports, 140 (1838).

mitted in granting and obtaining these certificates, for this court to say, or to allow a subsequent locator to say, as a matter of fact, that the Country Courts have not granted, or could not in fact grant, certificates for improvements which were not settlements.

Another real property decision, which illustrates Marshall's independence of thought, is the celebrated case of *Turman vs. White's Heirs*,¹¹ in which, after going carefully into the history of the Rule in *Shelley's Case*, he declares the adoption of the rule inadvisable, and refuses to follow it:

As it is confessedly an arbitrary rule, out of the reach of common men, and not accordant with their notions of the meaning and effect of language; as it was founded upon a state of things which has not existed for centuries in England, and never in this State, and as it was intended to advance a policy at war with our institutions, and of which there never has been a trace in our State.

A similar disapproval of a technical and artificial English rule is found in *Daniel vs. Thomson*,¹² where Marshall delivered a forty page opinion refusing to adopt the English construction of the words "dying without issue."

The scarcity of money in the young Commonwealth made it extremely difficult for lenders to resist the temptation to demand more than the legal rate of interest, and scores of cases arose from the subterfuges resorted to in order to evade the operation of the usury laws. Judge Marshall discusses in a most

¹¹ 14 Ben Monroe's Reports, 56 (1854).

¹² 14 Ben Monroe's Reports, 662 (1854).

interesting manner the purpose and effect of these laws, in the case of *Estill vs. Rodes*,¹³ in which he reaches the conclusion, the correctness of which perhaps is open to doubt, that the right to recover usurious interest does not arise until the borrower elects to reclaim it, and creditors of the borrower can not make this election for him. In other words, if the debtor who has paid usurious interest does not choose to object, his creditors can not, because while the right of recovery after the election to reclaim, is a chose in action, the mere right to reclaim is not.

Of course, no institution ever has been a more prolific source of litigation than that of slavery. For some purposes slaves were property, for some they were persons, and unusual doctrines had to be invented to meet the anomalous situation. Marshall delivered many opinions which involved slavery, but it is as great a compliment as could be paid to him to say that one may read every one of them from beginning to end without learning whether Marshall was a believer in slavery or not. Kentucky of course was a slave state, although from the nature of its soil, slaves were not so important a feature of its life as they were in other states. Many signs indicate that the people of Kentucky were not, in general, so deeply interested in perpetuating the institution as were their neighbors to the east and south, and from this fact as well as from Marshall's unwavering adhesion to Henry Clay, who was an abolitionist, we

¹³ *I* Ben Monroe's Reports, 314 (1841).

may doubt if Marshall's personal views were favorable to slavery. The law of the state, however, contemplated the status, and Marshall naturally felt himself bound to execute it.

The first important decision which Marshall wrote is that in *Singleton vs. Young's Executors*,¹⁴ in which he construes the statute providing for the recording of mortgages of slaves, and decides that the recording is to be in the county in which the mortgagor resides, and not in the county in which the slave happens to be at the time of the mortgage, on the ground that the residence of the mortgagor is likely to be more permanent and to be more easily traceable than that of the slave. Judge Ewing dissented from the decision, but the question was a practical one, and Marshall's conclusion was decidedly more practical than Ewing's.

In *Snead vs. David*,¹⁵ Marshall seems to have gone out of his way to help the slaves. The Legislature had provided that slaves could be emancipated by will, "saving the rights of creditors," but no way of protecting the rights of creditors was prescribed. Now slaves of course were assets for the payment of debts, and the question arose whether when an owner by will emancipated his slaves, they became free *ipso facto* upon his death, or remained slaves and under the control of the executors until it was found that there was sufficient other property with which to

¹⁴ 3 Dana's Reports, 559 (1835).

¹⁵ 9 Dana's Reports, 350 (1840).

pay the debts. Marshall decided that the emancipated slave became free at once on his master's death, and so remained until the executor, finding the estate otherwise insolvent, should proceed against the former slave and obtain a decree to sell him. This situation of defeasible freedom strikes one as highly anomalous, and the necessity of keeping the slave, who, *ex hypothesi* is a free man, under restraint, until it is found that he is not needed for payment of debts, accentuates the lack of logic in the decision.

Commonwealth vs. Griffin,¹⁶ is one of the best of Marshall's decisions. In it he holds constitutional the act of 1833 forbidding citizens of Kentucky thereafter to import slaves into the state. The Act was attacked among other reasons on the ground that it violated the commerce clause of the Federal Constitution. On this point Marshall, a strong states' rights man, says:

Whatever power Congress may possess under this clause to regulate the transit or transportation of slaves as the subject of property, or as articles of commerce among the several states which may recognize them as subjects of property and articles of commerce, we regard it as a fundamental proposition . . . that each state possesses the unquestionable right of determining for itself, whether and to what extent the right of property in persons of the African race shall be recognized within its own territory, subject only to the provisions of the third clause of the fourth article of the Federal Constitution, which secures the right of property in fugitive slaves, against the legislation of any state in which such right of property is not generally recognized, and

¹⁶ 3 Ben Monroe's Reports, 208 (1842).

subject also to any power which Congress may have under clause three, section eight, article one, to provide for the transit of slaves as articles of commerce or as subjects of property, through states which do not by their own laws recognize them as such. . . . The right of each state to authorize or prohibit absolutely or conditionally, the importation of slaves, is a part and an essential part of its right of determining whether slavery shall or shall not exist within its limits.

Probably the best-known of Marshall's decisions is that in the case of *Graham vs. Strader*,¹⁷ which concerned the effect of the passage by a slave into a state where slavery was not recognized. Considering that Kentucky for many miles was separated only by the river, from Ohio which was part of the North-West Territory, the ordinance establishing which provided "there shall be neither slavery nor involuntary servitude in the said Territory," the importance of the question whether a temporary sojourn in Ohio had the effect of emancipating a slave, was of immense importance to the slave-owners of Kentucky. In the case of *Graham vs. Strader* the slave had returned from Ohio to Kentucky with his master, and the Court held that upon his return he became again a slave.

We do not admit that the citizen of another State, whose laws recognize and establish this species of property, loses instantaneously and forever, all dominion and right of property in his slave whom he had taken with him in traveling through one of those States, or in a temporary and momentary sojourn for a particular purpose of business or pleasure, so that upon the

¹⁷ 5 Ben Monroe's Reports, 173 (1844).

voluntary and immediate return of both into their own State, the pre-existing relation of master and servant must, in view of their own laws, be regarded as at an end. . . . A slave returning voluntarily with his master from a free state is still a slave by the laws of his own country.

This pioneer decision was approved again and again, not only in Kentucky, but in all the other slave states, and by the Supreme Court of the United States, and did more than any other case to establish Marshall's reputation.

The only other decision of Marshall on the subject of slavery, to which attention should be called is that in the case of *Graves vs. Allan*,¹⁸ in which, seeing clearly through the specious arguments advanced by the owner of a slave to whom a bequest had been made, Marshall held that since such a bequest was wholly inoperative to grant anything to the slave, it could not operate to vest the legacy in the owner of the slave, whose rights necessarily would be derived from the slave himself.

It is natural that the decisions of which we have spoken, on the peculiar land-laws of Kentucky, on usury and on slavery, have not much current value. On the other hand intricate problems of corporation law and delicate questions of negligence law did not come before Marshall. His best work, in our mind, on any subject of modern interest, consists in his decisions on insurance law, although it has been said that "his decisions on aquatic rights alone would

¹⁸ 13 Ben Monroe's Reports, 190 (1852).

form a treatise superior to any text-book on the subject."¹⁹

The navigation by small boats of the Mississippi and Ohio Rivers was attended in those early days with such risks that the poor owners of the boats urgently required some protection against the destruction of that which comprised about all that they owned. As early as 1802, therefore, a marine insurance company was formed to give them this protection, and in Marshall's day marine insurance probably was in more general use in Kentucky than anywhere else in the country. We scarcely should be justified in discussing at length the insurance decisions which Marshall delivered, and shall content ourselves with referring briefly to Louisville Marine and Fire Insurance Co. vs. Bland,²⁰ a particularly well-considered opinion which settled the meaning of a warranty against average below a certain per cent. of the value of the goods insured, holding that the insurer agreed that the loss for which claim could be made against the insurer must amount to at least the specified per cent. of the value not of the whole cargo insured nor of the various articles on which the average was the same, but to the specified per cent. of the value of the particular kind of goods for which claim was made, and to The Ætna Insurance Co. vs. Jackson,²¹ which decided that the mere sale of goods

¹⁹ W. M. Paxton, "The Marshall Family," p. 185.

²⁰ 9 Dana's Reports, 143 (1839).

²¹ 16 Ben Monroe's Reports, 242 (1855).

by the insured to a third person, who did not remove them, and had not paid for them, was not such a substantial change of interest as avoided the policy.

Of the nautical decisions of Marshall, about the most interesting is that delivered in *Bentley vs. Bustard*,²² where the circumstances under which freight may be jettisoned without subjecting the ship-owner to liability to the owner of the goods thus destroyed, are considered at length, and a rule deduced so plain and simple that any ship captain could learn from it exactly how to act under any set of conditions. *Morrison vs. Thurman*,²³ one of the last cases which Marshall decided, contains what really amounts to an essay on the rights of persons navigating rivers, to use the shores belonging to private owners, in cases of danger. The eminently practical way in which these purely practical matters are discussed, is entirely admirable.

Marshall did not deliver many opinions on constitutional law, but several which he did deliver are well worthy of mention. *Newport vs. Taylor's Executors*,²⁴ concerned the power of a state to regulate ferries across an interstate river, in the absence of Federal regulation, and it is particularly noteworthy because of the emphasis with which Marshall, who, as we have said before was a strong states' rights man, insisted upon the preservation by the states of

²² 16 Ben Monroe's Reports, 643 (1855).

²³ 17 Ben Monroe's Reports, 249 (1856).

²⁴ 16 Ben Monroe's Reports, 699 (1855).

the few rights which the Supreme Court of the United States had left to them.

The proposition that the power of Congress extends to all subjects, the regulation of which may, however remotely, affect commerce among the states, and that the mere grant of the power, though not exercised is a prohibition of its exercise by the states, is inconsistent with the essential rights of self-government and self-preservation which never were, and so long as they retain a vestige of independence never can be, yielded by the states.

The judgment of the Kentucky Court of Appeals in this case was affirmed by the United States Supreme Court.²⁵

The internal growth of Kentucky gave rise to a very interesting case of universal importance. The case is Cheaney vs. Hooser,²⁶ and the question which is presented was whether the Legislature had the right to extend the boundaries of a city so as to include within its limits, and thereby render subject to taxation by it, the property of an owner who objected to the inclusion and who claimed that it was an unconstitutional attempt to appropriate his property. As Marshall at once perceived, the case involved the right of the Legislature to incorporate local government with powers of local taxation, and he treated the matter in a way worthy of its magnitude. He holds that the Legislature has the right to fix and reform the limits of a local government with power to tax for local purposes, and that the inclusion

²⁵ 1 Black's Reports, 603 (1861).

²⁶ 9 Ben Monroe's Reports, 330 (1848).

therein of the property of a man who protests that he does not want the protection of a local government and that to tax him for its support is a taking of his property without just compensation, is not unconstitutional except in cases where the Court easily can see that the owner who complains was subjected to this liability for taxation not because the Legislature believed that the public interests required it, but only because of an unjustifiable wish to injure the complainant. Marshall's intense repugnance to an interference by the judiciary in any matter of legislative cognizance is shown also in the case of *Talbot vs. Dent*,²⁷ where he held constitutional an act permitting the City of Louisville, with the consent of a majority of its voters, to subscribe to the stock of a company chartered to build a railroad from Louisville to Frankfort, and to pay for the stock by a local tax, saying that whether a particular public improvement was of such benefit to a particular locality as to justify a local tax for carrying out the improvement, was a matter to be determined by the Legislature, with whose determination except in cases of palpably gross abuse, the Court would not interfere. This same question which the Court had discussed in this last case came up again in the very celebrated case of *Slack vs. Maysville and Lexington Railroad Co.*,²⁸ in which Marshall wrote an opinion in accord with that in *Talbot vs. Dent*, in spite of a

²⁷ 9 Ben Monroe's Reports, 526 (1849).

²⁸ 13 Ben Monroe's Reports, 1 (1852).

vehement and able dissent over one hundred pages in length, by Judge Hise.

Another case raising a constitutional question now well-settled, but somewhat novel at the time, is the case of Commonwealth vs. Milton,²⁹ where Marshall in a forceful opinion, upheld the constitutionality of an Act requiring foreign corporations to pay a tax not demanded from domestic corporations. Those who attacked the Act claimed that it deprived citizens of one state of the privileges and immunities of citizens of another state. Marshall emphatically denied that this provision of the Constitution empowered a state to confer on a corporation the right to exercise in any state all the rights which its charter gave it in the state of its incorporation.

The apparent reciprocity of the power would prove to be a delusion. The competition for extraterritorial advantages would but aggrandize the stronger to the disparagement of the weaker states. Resistance and retaliation would lead to conflict and confusion, and the weaker states must either submit to have their policy controlled, their business monopolized and their domestic institutions reduced to insignificance, or the peace and harmony of the states would be broken up, and perhaps the Union itself destroyed.

Throughout the cases which we have cited, will be noticed a strong tendency on Marshall's part, to uphold the rights of the states to control conditions within the state. In view of this tendency, one is surprised at the decision in Stevenson vs. Gray,³⁰

²⁹ 12 Ben Monroe's Reports, 212 (1851).

³⁰ 17 Ben Monroe's Reports, 193 (1856).

in which case Marshall held that where citizens of Kentucky went to Tennessee to consummate a marriage declared to be unlawful by the laws of Kentucky, but permitted in Tennessee, namely, a marriage between a man and his uncle's widow, the marriage would be recognized as valid in Kentucky, although all the evidence indicated that the parties had married outside of the state of their domicile simply to escape the effect of the Kentucky Act. It perhaps is not necessary to discuss this decision further than to say that in most of the states a similar marriage would be held to come within one of the exceptions to the rule that a marriage if valid where celebrated must be recognized wherever the parties go. The decision was put on the ground of the great impolicy of subjecting the marital relation to attack. Marshall's insistence on the permanency of the relation of husband and wife is illustrated in the case of *Simpson vs. Simpson*,³¹ where he held an agreement of separation invalid, and refused to permit the wife to sue for property which the husband in the agreement promised to give to her.

The last decision of general interest to which we shall refer was the very elaborate opinion delivered by Marshall in the case of *City of Louisville vs. University of Louisville*,³² which determined under what conditions a corporation became a public corporation so as to deprive its charter of the protection

³¹ 4 Dana's Reports, 140 (1836).

³² 15 Ben Monroe's Reports, 642 (1855).

against subsequent legislative enactments given to other corporate charters by the Dartmouth College Case and held that the University of Louisville was not such a public corporation.

While we now have considered the decisions of Judge Marshall which are most important from the standpoint of a modern practitioner, there are other cases which excited much more popular interest at the time, although of little value now. For instance there is the decision in *Gibson vs. Armstrong*,³³ fifty pages long, which determined the effect upon the property of the Methodist Episcopalian churches, of the schism in that denomination resulting in the formation of two distinct bodies in the slave and free states. Then there is the excellent opinion in the sensational case of *Singleton vs. Singleton*,³⁴ in which the will of the famous Colonel Singleton was set aside on the ground of undue influence. Finally there is the case of *Gorham vs. Luckett*,³⁵ which precipitated a conflict between one of the County Courts and the Court of Appeals so violent that the Court of Appeals found it necessary to direct the imprisonment of the County Court judges in order to enforce compliance with the decision of the higher court.

We need not say that among the hundreds of opinions which Marshall delivered there are many others

³³ 7 Ben Monroe's Reports, 481 (1847).

³⁴ 8 Dana's Reports, 315 (1839).

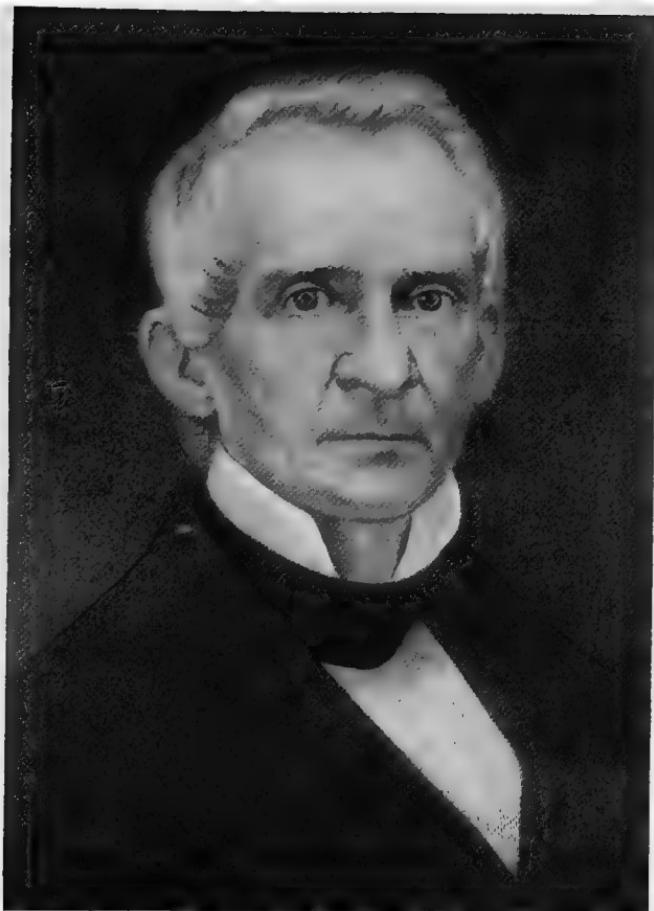
³⁵ 6 Ben Monroe's Reports, 146 (1845).

which show his singular clearness of thought, but the above perhaps are enough to justify the inclusion of his name among the famous judges of the United States, as one of the earliest who helped to mold into enduring shape the principles of right and justice in the great territory west of the Appalachians.

EUGENIUS ARISTIDES NISBET.

EUGENIUS A. NISBET

From a painting by Charles d'Beruff in the Supreme Court Room
at Atlanta, Georgia, executed in 1871.



EUGENIUS ARISTIDES NISBET.

1803-1871.

BY

JOSEPH RUCKER LAMAR,

Ex-Justice of the Supreme Court of Georgia.

GEORGIA had been a state seventy years before it had a Supreme Court. This want of a central tribunal, to correct errors and make uniform the practice in the various circuits, resulted in great diversity and uncertainty in her judicial system. When, in 1845, the Court was actually organized, the task of bringing order out of the confusion, without unduly disturbing titles and affecting rights, and of bringing her jurisprudence into harmony with that of the other American states, was a new and delicate problem extremely difficult of solution. The task would, indeed, have been impossible had it not fallen to men of extraordinary ability. Lumpkin, Warner and Nisbet, the first justices of the new Court, were each men of marked individuality, differing widely in gifts and talents, but agreeing in their love of law and passion for the administration of justice. Twenty years before the Court was organized, Eugenius A. Nisbet, then a young lawyer, was conspicuous in the bitter and prolonged contest

to secure an amendment to the Constitution to provide for the establishment of a court for the correction of errors. This part of his record as a legislator, the fact that he was one of the first three judges of the newly organized tribunal and bore a notable part in laying the foundation on which Georgia's judicial system was built, make it peculiarly fitting to include a sketch of his life in a work that proposes to deal with the biography of those who have greatly influenced the jurisprudence of their states.

Eugenius A. Nisbet was born in Greene County, Georgia, December 7th, 1803. His ancestry was one calculated to stimulate the mind and strengthen the heart for high and noble endeavor. His line went back to Murdock Nisbet, a Lollard of Kyle, who, persecuted for his religion, left Scotland with a manuscript copy of the New Testament in Greek, from which he made the translation afterwards used by his grandson, John Nisbet, in reading and expounding to those who came to him while hiding in the mountains and caves of Scotland during the bloody persecution of 1666. This John Nisbet was made Captain for his bravery at the celebrated battle of Bothwell Brig. He was wounded, but escaped the immediate fury of the Butcher Claverhouse who set a price on his head; and after untold sufferings he was captured and suffered death—a martyr to his belief.

All the adherents of the League and Covenant were savagely persecuted, and John Nisbet's de-

scendants were driven from Scotland to the North of Ireland whence, about 1700, they emigrated to Pennsylvania, and shortly removed, with many other Scotch Covenanters to North Carolina. John Nisbet 2d, settled in what is now Rowan County, where he, his son, John 3d and grandson John 4th, occupied positions of influence in the community and held, in unbroken line, the office of Ruling Elder.

In that remarkable exodus from Maryland, Virginia and North Carolina to Georgia which followed the Revolutionary War, went John the 4th's son, Dr. James Nisbet, likewise a Ruling Elder. In 1791, he settled in Greene County, then, as now, a center of that pure and most distinctive American type, which has given so many men of ability and character to the state and nation. He was a learned physician, and even in the midst of so high a type of citizenry, a leader and man of prominence. He was delegate to the convention which adopted the Constitution of 1798; for thirteen years an active member of the Board of Trustees of the State University, and at the time of his death a Presidential Elector on the Jackson ticket. Like all the Nisbets, he was uncompromisingly pious, and we catch a glimpse of his character from the Presentment prepared by him as Foreman of the Grand Jury of Greene County, in 1798, when he presented two offenders for "*Prophane swearing*, and we cannot but subjoin our regret that this evil and abominable practice is so prevalent amongst us. We not only consider it one of

those evils which destroys the principles of virtue and integrity, but of all wicked practices, it is certainly the most unnecessary and impolite."

His son, Eugenius, was a gifted child and a brilliant youth, to whom his father gave all possible educational advantages. With a Translator of the Greek Testament, a Martyr, Covenanters, and four Ruling Elders for his immediate ancestors, those who believe in heredity will not wonder that to his intellect were added the conscience and courage out of which Nature makes great characters. He lived in the days when the country was young, and when youth rather than experience was at a premium. At what would now be regarded as a very early age, he entered the University of Georgia, and before he was nineteen graduated at the head of his class, with the highest honors of the institution. He showed special aptitude for the classics, and during his college course received the full benefit of the ante-bellum training, wherein students were taught to read Latin rather than parse it. What he lost in the science of the language, he gained in art and facility of expression. His clearness of statement and vigor of style, bore witness to the advantage of having learned how to untangle from a foreign language the great thoughts of great men. In after life, his reputation as a man of Letters was second only to his reputation as a Lawyer, and he was repeatedly urged to accept the Professorship of Belles Lettres at the University, and was actually elected as such Professor by

Oglethorpe College. While he declined to serve in such capacity, he wrote many articles and delivered many addresses which demonstrated his literary ability. He was made Doctor of Laws in 1868 by his Alma Mater. His great professional success showed that the highest culture did not prevent solidity of legal learning, nor lessen his reputation as a judge on the bench. Through his life he manifested the most intense concern in educational affairs, presided over the great Educational Convention held in 1850, and was an active Trustee of the University, to which position he had been elected after his father's death.

Immediately on his graduation in 1821, he entered the office of Judge Augustin S. Clayton, then one of the foremost lawyers in Georgia, a judge of the Superior Court, a compiler of the Digest, afterwards a member of Congress, and an author of great reputation in his day. But young Nisbet did not long remain a student of Judge Clayton's. According to Sparks, following the example of "Thomas Flounoy, Nicholas Ware, William Cumming, L. Q. C. Lamar, and William C. Dawson, all of whom had achieved the highest professional success," he left the law office for the law school, and, like them, completed his studies at Litchfield, Connecticut. Years afterwards, in a Memorial Address on Senator Dawson, Judge Nisbet recognized the advantage of this training, and said "that Judges Reeves and Gould were two of the most accomplished jurists in

New England, and the best law instructors then in the Union."

After completing the course at Litchfield, he returned home in 1822, eager for the fray, and, too impatient to wait until he was of age before beginning to practice. A special Bill was introduced into the General Assembly to allow him to be admitted to the Bar, notwithstanding his minority. Its passage, however, was vigorously fought by those who "conscientiously believed that no one so young as Nisbet could be sufficiently matured mentally to discharge properly the duties of the profession."¹

The contest excited great interest at the time. Notwithstanding the violent opposition, the Bill was passed, though with an amendment which really contained an implied compliment, in that it provided that "the said Eugenius Nisbet shall after the date of his admission as aforesaid, be deemed and held competent in law to enter into contracts and shall be responsible therefor in like manner as if he were of full age." So that the youngster was made not only a lawyer but a full-grown man by Act of the General Assembly. Immediately upon his admission to the bar, he married Miss Amanda Battle, a charming and gifted woman to whom he had been engaged from boyhood. He settled at Madison, and joined "the Ocmulgee Circuit, which has been the Nursery" of the Bar of Georgia. Many of the most prom-

¹ Sparks, *Memoirs of Fifty Years*, p. 479.

inent members of the profession began practice within its limits. Its Court Rolls have been illustrated by the names of Early, Cobb, Shorter, Gordon, Rockwell, Lamar, Longstreet, Dawson and Cone. In 1825, it was, "as a whole, perhaps the strongest Bar in the State."² And Judge Nisbet always regarded it as a great good fortune that he thus early met men of strength and learning than he himself had then acquired, saying that "professional rivalry is one of the chief sources of professional greatness. One great and good man reproduces himself by acting upon that principle in our nature which constrains us to admire virtue and to emulate greatness."³

The contest over the Act admitting him to practice had called public attention to the stripling, and he at once entered into a lucrative practice which he retained by faithful and able attention to his clients' cause. So rapidly did he grow in public esteem that business and preferment were thrust upon him. He was soon elected to the Legislature, and after a brilliant career in the House was sent to the state Senate. During his service in the General Assembly, many of the most interesting and exciting questions which have ever been discussed in that body were up for consideration. It was the time of

² Livingston's Biographical Sketches of Eminent American Lawyers, p. 548.

³ Miller's Bench and Bar of Georgia, vol. I, 307.

the Troup and Clarke Parties, and when Georgia was in the midst of that State's Rights controversy with the General Government arising out of questions connected with the quieting of the Indian Title. On this subject; on the proposed revision of the criminal laws; on the duty of the state to give liberal support to the University, and on the necessity for a Supreme Court, the young man spoke with the wisdom of age. But he was not only a speaking but a working member; and the care and ability with which he prepared reports, the solidity of his reasoning, and his extraordinary powers as a debater, marked him, from the beginning, as a coming man. In 1837, he moved to Macon, as affording a wider field for professional endeavor, and there formed a law partnership. He grew in reputation and estate. He was a wise and cautious counsellor, and what he said of another applies to himself.⁴

Like every wise man he felt the insufficiency of his knowledge, and the limited range of his capabilities, and like every determined man he disciplined his nature to put forth his strength when the necessities of time and occasion required. . . . In legal discussions he relied more upon elementary principles than adjudicated cases. His was not the error of crushing a case under accumulated authority, or the folly of stifling it under a cloud of remote analogy.

His reputation for character and ability brought him the nomination for congress on the general Whig ticket. He was elected in 1838 and again in

⁴ Miller's Bench and Bar of Georgia, vol. I, 311.

1840, and resigned upon learning that his firm had endorsed and become liable on a debt, immense for that day. He returned to Macon, secured the release of the junior member of the firm, and paid the holder of the claim. But, for twenty years, the consequence of this severe strain on his finances, taxed his energies, and though he accumulated a large estate, it was not until he was an old man that he was finally able to discharge the last cent of the debt contracted to pay the surety obligation.

In Macon, as in Madison, demands for public service came to him. He was elected to the Supreme Court in 1845; returned to the bar in 1853; was nominated as candidate for Governor against Joseph E. Brown in 1861; was elected to the Provisional Congress of the Confederate States, but declined to serve on account of the condition of his health and his desire that there should be a full representation of the state in that body. His last public service was as delegate to the convention of 1861.

Probably no single fact in Judge Nisbet's career so forcibly illustrates the commanding position he held in public esteem, as the fact that, though he had always been a Union man, he was in that convention made Chairman of the Committee of which Alexander Stephens, Robert Toombs, Thos. R. R. Cobb, Benjamin H. Hill, and Herschel V. Johnson were members. Each was a giant, and no less than a giant could have been called on to preside over such a Committee, to which had been referred the

preparation of the Ordinance of Secession. That momentous document was drafted by Judge Nisbet, and in grave and solemn words declared:

That the Ordinance adopted by the people of the State of Georgia in the Convention of 1788, whereby the Constitution of the United States was ratified and adopted, is rescinded and abrogated, and the union now subsisting between the State of Georgia and the other States, under the title of the United States of America is dissolved, and the State of Georgia is in full possession and exercise of all those rights of sovereignty which belong and appertain to a free and independent State.

Judge Nisbet was about five feet seven inches high, slender, and very dignified. He was exceedingly reserved, though this did not prevent his receiving the enthusiastic support of the people when a candidate for their suffrage. Like all his American grandsires, he was a Ruling Elder, and deeply religious. His home life was ideal. He continued in the active practice of his profession until March, 1871, when he died as a result of a cold contracted on the occasion of laying the corner-stone of the Court House in Macon.

This brief summary of Judge Nisbet's career as a public man is sufficient to show that in his day he was a man of shining mark and preëminent ability. These legislative offices and his services therein were no doubt considered as the sure foundation of his fame, but it is one of the anomalies of fame that even the greatest popular reputation vanishes with the years and is forgotten except by the student, while

oftentimes it is the quiet and unostentatious service, little noted at the time, which becomes the basis for the wider and more permanent renown. It was so with Judge Nisbet. "It was his good fortune," as he said of another, "never to have had any withdrawal of public favor." He was never a victim to popular caprice, and never realized one division of Burke Aphorism that "popularity may be acquired without a single virtue, and lost without a single fault."⁵ In common with the other members of the bar, he realized "that whilst the profession of the law exacts the severest labor, demands the most profound learning, and the most liberal education, and evokes the most brilliant display of genius, yet it affords no record, for the most part, of the greatness of its ornaments. We must catch the glory as it flies and fit it upon the memory of men."⁶ It cannot live upon the printed page. His permanent reputation, therefore, does not consist in what he did as lawyer, congressman, or in the legislative halls, but is founded upon his ability as a judge and his work, with the other justices, in laying the foundations and beginning the upbuilding of the jurisprudence of his native state. As judge he found conditions absolutely unique. For Georgia alone, of any modern Anglo-Saxon state, had attempted to conduct government without a central and supreme tribunal—necessary not only to correct errors affecting the individual, but

⁵ Miller's Bench and Bar of Georgia, vol. I, 314.

⁶ Miller's Bench and Bar of Georgia, vol. I, 314.

to preserve that uniformity of the law so essential to public tranquillity and stability of titles. Elsewhere the ablest judges have entered into the labor of others, and have continued the development of a system which they found already existent and where, often, they had to follow what they felt was unsound. But the first justices of the Georgia Supreme Court found conditions plastic, with an opportunity for wise and untrammeled service. It is impossible to consider his work and the extent of his influence as a judge without referring to the causes leading up to the organization of the Court, of which he was one of the first members.

All the colonies except Georgia, in addition to the Common Law, had a body of Statute law suitable to their local conditions, and a fairly developed judiciary system before the Revolutionary War. All except Georgia had courts for the correction of error, and most of them were printing reports of decisions before the beginning of the Nineteenth Century. But such was not the case of the last and weakest of the colonies. The paternalism and mistaken kindness of the Trustees prevented anything like local self-government. There was no Assembly and no means by which local institutions could develop. The repressive measures of the trustees defeated the repeated efforts of the colonists to secure such privileges. When the Charter was surrendered in 1752, and Georgia became a Royal Province, it received no new Charter, and therefore had no measure of its

political rights. Such few Colonial Statutes as were passed, after 1752, were of temporary nature, and had in them none of the germs out of which institutions develop. Besides, it was a time when the people were digging up and cutting down rather than developing governmental systems. After the Revolutionary War, the conditions were likewise unfavorable to such growth. The Seacoast population had come directly from England. That of Middle and Upper Georgia had come from Maryland, Virginia and North Carolina, and had not yet become homogeneous. So that nothing permanent was done toward the establishment of local law until the Judiciary Act of 1799. That was the great work of great men, and has since remained the frame-work of her judicial system. But it was the work of men who were ready to make experiments, who had no reverence for the Common Law, as such; who with their political antagonism to the Mother Country, had a special dislike for entails, special pleading, Chancery Court and Appellate tribunals, with the delays and the expense incident to prolonged and protracted litigation. While the body of the Common Law had been adopted, they wanted the Common Law put into a Code, and, as pointed out by Governor Forsyth in his Message of 1827:

The authors of the Constitution of 1798 contemplated the revision, digest and arrangement of the written and *unwritten* law of the State and the publication of the whole in the most useful form. And should it be thought necessary to make a dis-

tinction between them, the *body of our law* must be taken to be exclusively applicable to the Common Law as the trunk, from which the Statute law has branched forth.

Georgia, therefore, was the pioneer in requiring Codification, as she was also in having in fact the first Code of the Principles of the Common Law. She was also far and away the first in the reform of Procedure. Fifty years before the New York Code of pleading and practice, Georgia had "abolished all distinctions of actions," and cut out, root and branch, the subtleties and technicalities of Common Law pleading. By the Act of 1799, it was only required that the plaintiff should state his cause of action, and the defendant his defense, "plainly, fully, and distinctly." But this Act not only blazed the way in simplicity and clearness of Pleading but it was also the first step toward the union of law and equity in a single court wherein, though Masters and Auditors were not unknown, disputed questions of fact were decided by a jury in Equity cases, in the same manner as at common law.

All these innovations have stood the test of a century. While the authors of the Act of 1789⁷ provided for a Court to correct Errors, their immediate successors, in 1801,⁸ repealed the section and entered upon an experiment that proved a calamitous failure. They seemed to think there was no necessity for a Court of Review, because the statutes gave to every

⁷ Section 59.

⁸ Clayton's Digest, p. 38.

unsuccessful litigant, the absolute right to one new trial, as a matter of course. This second trial was to be before a special jury, taken from the Grand Jury, and sworn, among other things, to find a verdict according to "the Equity of the case." At first, this worked most satisfactorily to the great body of the people. And when population and wealth increased, and the defects of the system began to appear, there was no popular disposition to accede to the argument of those who insisted that it was necessary to have a Supreme Court.

The popular mind was hostile to all such Courts, because the state had been, and was then, in a contest with the Supreme Court of the United States. Georgia had been sued in that Court by *Chisholm*,⁹ out of which case came the *eleventh* Amendment to the Constitution of the United States denying to an individual the right to sue a sovereign State. This antagonism to Appellate tribunals of all sorts was kept alive in the public mind by the litigation growing out of the efforts to quiet the title to the Indian lands in North Georgia, and the heated discussions which arose when the writ of error was served on the Governor in the case of the Indian, "Corn Tassel," who had been convicted of the murder of another Indian and sentenced to death, and the subsequent refusal of the State to appear when served with a writ of error in the case of the Missionaries.¹⁰

⁹ 2 Dallas' Reports, p. 419.

¹⁰ Wooster vs. Georgia, 6 Peters' Reports, 515; Decision by Conven-

But while there was no court for the correction of errors, many realized the absolute necessity therefor, and that part of the Act of 1799 requiring the judges to meet and make rules of practice was laid hold of to organize what was called a convention, but what was in effect a voluntary Supreme Court. Under this statute the judges annually met. While together, they naturally submitted to one another difficult and important questions which they had under consideration. They fell into the habit of discussing these matters, and were, no doubt, influenced by the views of one another. The consequence was that these meetings, these discussions, and these resulting opinions, grew into a custom, and as they were at first required, and subsequently permitted, to alternate, they occasionally presided with one another on Circuit, in the trial of difficult and important cases. Under this practice, when the constitutionality of the "Alleviating" or what we would now call "Stay," law, was under consideration, four of them met in convention at Augusta in 1815, and after argument, in a decision of marked ability pronounced the law void as impairing the Obligation of a Contract. Thereupon, the hostility to courts found new expression, and at the succeeding session of the General Assembly the House passed a Resolution which recited:

tion of Judges in State vs. Tassel, Dudley Reports, 230; Miller's Bench and Bar of Georgia, vol. I, 187, 191; Miller's Bench and Bar of Georgia, vol. II, 56.

Whereas, John MacPherson Berrien, Robert Walker, Young Gresham, Stephen W. Harris, Esquires, Judges of the Superior Courts of this State, did on the 13th day of January, 1815, pretending to be in legal convention, and assuming to themselves, being so assembled, the power to determine on the constitutionality of and binding efficacy of laws passed by the General Assembly, and did declare certain Acts of the Legislature, in their decision named, to be unconstitutional, and WHEREAS, the power of the Judges so to convene is absolutely denied, and the *more extraordinary power of determining upon the constitutionality of Acts of the Legislature*, if yielded by the General Assembly, whilst it is not given by the Constitution, would be an abandonment of the dearest rights and liberties of the people, RESOLVED that we view with deep concern and regret the aforesaid conduct of the Judges and cannot refrain from expressing our entire disapprobation of the power assumed by them of determining upon the constitutionality of laws regularly passed by the General Assembly. We do, therefore, most solemnly declare and protest against the aforesaid assumption of powers, and with heartfelt sensibility, deprecate the serious and distressing consequences which followed the decision. Yet we forbear to look with severity on the past, in consequence of judicial precedents, calculated in some measure to extenuate the conduct of the Judges, and hope that for the future, this explicit expression of public opinion will be obeyed.

The records are so incomplete as to make it impossible to determine the effect of this Resolution, or the frequency with which the Convention thereafter settled disputed questions, though it does appear from the preface to Dudley's reports and the Call by William H. Crawford ¹¹ that "the Judges in November, 1830, regardless of the additional expense

¹¹ Miller's Bench and Bar of Georgia, vol. I, 237.

and trouble, again resolved to hold a convention semi-annually for the purpose of advising with each other, and discussing fully and freely all questions of a doubtful and complex character which might arise before each in their respective circuits, and thereby enable each judge to settle such question in the light of the wisdom of the whole Georgia Bench."

And it seems that at least, on some occasions, counsel were heard by the convention.¹² The fact that so much power and responsibility was vested in the Judges of the Superior Court had its natural effect. It attracted able men to the Bench and stimulated them to the highest endeavor.¹³ After 1830 the convention was presided over by no less a man than William H. Crawford, who had been Secretary of the Treasury, Minister to France, and nominee of his party for President of the United States.

It may be that the unifying work of the convention in some measure lessened the sense of the need of a Supreme Court, at any rate, session after session a bill was regularly introduced providing for a court of errors, and as regularly defeated. There are no

¹² 9 Georgia Reports, 260.

¹³ Chief-Judge Lumpkin says, in *Carey vs. Styles*, 9 Georgia Reports, 259, that the Bench was then "ornamented by men whose ability had never been equaled in any period of the State's history;" and again in 5 Dudley's Reports, he says that the opinions of Wakeman vs. Roach (by Judge Law), and Brewster vs. Hardemen (by Judge Lamar) "might be placed on a level with the best productions of the American or English bench." And Judge Nisbet, in *Wilder vs. Lumpkin*, 4 Georgia Reports, 219, paid a similar high compliment to another decision by Judge Law.

reports of the debates extant, and the journalism of that day does not furnish information on the subject. The fullest, though very brief, review of the situation is found in Sparks' Memoirs of Fifty Years.¹⁴ He says that the principal ground of objection by the people was the fear that the creation of a Supreme Court would interfere with the special juries which was intended to obviate the necessity for a Court of Chancery.¹⁵ But juries are as liable to commit error as the trial judge and there was no way by which these errors could be corrected, unless the presiding judge voluntarily brought the case before the convention.

While in the State Senate, young Nisbet introduced a Bill for the establishment of a Supreme Court, and in its support made his most celebrated speech, in which he took up, *seriatim*, the objections to such tribunal, and answered them one by one. At the request of the majority of the Senate the speech

¹⁴ Page 73.

¹⁵ In speaking of the special juries, Sparks says, "The conception was a new one, and in Georgia, with her peculiar population, its effects were admirable. It was unknown in the judiciary system of any other State. It was an honest, common sense adjudication of Equity cases, and rendered speedy justice to litigants. The special juries were sworn to well and truly try the issue between the parties, and a true verdict give according to law and equity, and the opinion you entertain of the testimony." Under the pleadings, the entire history of the case went before this jury, and their verdict was final. Dishonest litigants feared this special jury. Their characters, as that of their witnesses, passed in review before this jury, whose oath allowed a latitude, enabling them frequently to render a verdict ostensibly at variance with the testimony, but almost always in aid of the ends of equitable justice.

was published.¹⁶ It would be most interesting to see what was put forward by the opposition. It is not surprising to learn that the judges of the Superior Court were unwilling to be shorn of the great power they possessed, and Governor Gilmer in his "Georgians" says, the Virginia settlers, with a recollection of the great delay in the decision of cases in the Court of Appeals of that state opposed the measure, and as long as their influence was controlling in Georgia, prevented the adoption of the Constitutional Amendment.¹⁷

¹⁶ After diligent search no copy of it can be found.

¹⁷ We can get some view of the affirmative arguments in support of the measure and of the condition of affairs from the Message of Governor Forsyth, who was afterwards United States Senator, Attorney-General of the United States and Minister to Spain, and one of the most brilliant men of his day: He said:

"The condition of the judiciary requires your most serious attention. Under the present arrangement of eight judges of the Superior Court, each confined to the Circuit for which he is elected, supreme in his authority, not bound by the decisions of his predecessors or his contemporaries, and not always by his own, which will be, in turn, disregarded by his successor, there can be neither uniformity nor certainty in the laws for the security of the rights of persons or property. It is an awful reflection that property, life, liberty and reputation are dependent upon the decision of a single judge, uncontrolled and uncontrollable in his Circuit. . . . The confusion produced by contemporary contradictory decisions every day increases; property is held and recovered in one part of the State, and lost in another part of the State under the same circumstances; rights are asserted and maintained in one Circuit, and denied in another, in analogous cases. . . . We have all the judicial machinery for the correction of erroneous judgments. Appeals, writs of error, motions for new trial and in arrest of judgment, are used as if in mockery—since the appeals are tried, the writs determined, the motions decided by the same Judge whose erroneous judgment is to be corrected, arrested or set aside. All the delays of the English system are permitted; but time only is gained

But even after the Constitution had been amended, the opposition to the court continued. And for nine years the General Assembly met and adjourned without providing the necessary machinery for its organization or electing judges. The Act of 1841 was a tub to the whale. And by it the Superior Court judges were required to write out their decisions in full on all motions for new trial, and whenever of general interest to the state, these opinions were to be published and the volume distributed to the bar and officers.

The contest for the creation of the court continued, but the opponents were equally active. Some of the objections which they urged have been handed down by tradition. It was said that the cost to the state and to the litigants would be excessive; that there

or lost, unless indeed the presiding Judge has a mind of extraordinary vigor and magnanimity, capable of discovering and prompt to confess its errors, or death or a new election removes him from his place. The destruction of this judicial octarchy by the substitution of a single supreme Judge, whose decisions should govern all the Circuits, would be an important improvement. It is not necessary to vest such tremendous power in the hands of one individual. The object can be accomplished by a less dangerous means. The most simple and obvious remedy is the establishment of a court for the correction of errors. This remedy cannot, in my judgment, be applied without a change in the Constitution which requires that 'errors should be corrected and new trials determined by the Superior Court of the County in which the action originated.' Under this clause of the Constitution, however, conventions of the Judges have been required, and in these, properly regulated, a palliative may be found for the existing disorder, until a radical cure can be effected by a change in the Constitution."

The speech of Nisbet, the powerful philippic of Governor Forsyth, aided by some of the other leaders of the Troup party, was unavailing, and it was not until 1836 that the amendment was adopted.

would be the usual and inevitable delays; that the court, like all other courts, would soon be behind in its business, and that the delay and expense would counter-balance any supposed good which might come from such tribunal.

It is also a matter of tradition that what now appears to have been a humorous argument was seriously urged. Some of the friends of the measure urged that the court need not be permanent; that in ten years at most it would settle all doubtful questions, and it could then be abolished. In view of the fact that the Supreme Court of Georgia annually decides more cases than any other Court of Review in the world, this argument should be embalmed as the greatest of judicial jokes.

At last, however, the Bill was passed; and we may catch a glimpse of the depth of feeling and satisfaction with which it was received by the bar and many of the people, from an incident recorded by Miller in his Sketch of Judge Strong.¹⁸ He says that at the first term of the court, after concluding the first argument which he had made since the passage of the Act, this venerable man said:

May it please your Honors, my experience at the Bar dates back nearly forty years. I thank God my life has been spared to this hour to behold a tribunal for the correction of errors. I can adopt the language of one of old with slight variation, and say, "Now let thy servant depart in peace, for my eyes have beheld the salvation of the Judiciary of Georgia."

¹⁸ Miller's Bench and Bar of Georgia, vol. II, 264.

Judge Lumpkin in the sixth volume Georgia Reports, said that "it was well known that when the Bill passed, a majority of the people of the state were opposed to it, and many compromises had to be accepted."¹⁹ The argument as to expense was met by a provision limiting the costs in the Supreme Court to a very small sum by comparison with the expense in other appellate tribunals. The argument as to delay was met by the requirement that each case should be heard and determined at the first term, and this provision has been preserved until the present day, with the result that, notwithstanding the volume of business in that court is greater than that of any other in the land, there is never any unfinished business, and while the Judges regret that they are often prevented from taking longer time to consider, the provision in the main has worked well.

Still it was recognized that the Act contained "inherent defects well calculated to insure its miscarriage. Who was willing to risk what little reputation he might have acquired by a lifetime of toil to be crushed perhaps forever, beneath the superincumbent ruins of a fallen fabric? To construct and put in operation a machine is a herculean task; to guide its subsequent movements is comparatively an easy matter."²⁰

It was Georgia's supreme good fortune that three such men as Lumpkin, Warner and Nisbet were

¹⁹ Page 116.

²⁰ Chief-Justice Lumpkin, 6 Georgia Reports, 117.

summoned to this task. As a young man Nisbet had done much to educate the public mind, and to secure the organization of the court, and he and his brethren were in a position to influence, as no other judges have ever been, the jurisprudence of their state. Conditions were plastic. They were unhampered and unfettered by narrow and binding state precedents. They had the whole field of the law from which to choose, with the right to select that which was best and discard what was narrow, contracted or unduly technical. But they each recognized that this liberty might degenerate into license, under which there would be no settled rule, with the result of making justice movable, variable, and changeable — substituting the judge's present idea of Equity for fixed law, by which not only the rights of the litigants should be determined, but on which the public should act in acquiring property and making contracts. These men steered with firm hand the middle course between these two extremes and early laid down principles by which they were to be controlled, and by which Procedure Law and Equity were settled on the foundation of sound reason; and good sense.

The new court was peripatetic. It met in every district, and had comparatively few cases for the first year or so after its organization. This enabled the judges to allow almost unlimited time for argument; and we can get some idea of how lawyers of that day availed themselves of the privilege, when we read

Thornton vs. Lane,²¹ where the Court said "in this case we have listened patiently, at least, if not with unmixed pleasure, to eight elaborate arguments occupying more than as many days." But as things went in those times that was not unusual. For we learn in the Life of Judge Story that it is not uncommon for the argument of a case in the Supreme Court of the United States to consume quite as much time; and in the note to Price vs. Watkins,²² it is said that Mr. Dallas, afterwards Secretary of the Treasury, "was a lawyer of inexhaustible eloquence,—and a speech of two, three, or even four days was not an unusual effort with him." But the point is that in the early days the court had ample time to listen and ample time to consider. Their decisions show the most thorough study of the question, a discussion of the underlying principles, a balancing of the authorities pro and con, reconciling apparently conflicting decisions, where this was possible, and, where the conflict was irreconcilable, the determination to select that line of authority which was best grounded in sound reason and which the experience of the Mother Country and of the other states had shown was best calculated to serve in the practical affairs of men and in securing justice. The result was that the people of Georgia, from having been bitter in their opposition to the court, soon came to have for it the highest regard, and in 1858 passed an Act, the like of

²¹ 11 Georgia Reports, 489.

²² American Decision, vol. I, 222.

which probably can not be found upon the statute books of any other state. It put the decisions of the court in the position of a statute, and declared:

That a decision by a full bench shall not be reversed or overruled, but shall be observed by all Courts as the law of the State and to have the same effect as if it had been enacted by the General Assembly.

Besides this expression of satisfaction with the working of the new tribunal, the Constitution of 1868 and the Constitution of 1877 expressly retained the court and reversed the spirit of that Resolution of 1815 which denied the right of the judiciary to declare a statute unconstitutional. While elsewhere the power to declare an Act unconstitutional is only implied, the Constitution of Georgia takes the question out of the domain of argument, and in explicit terms declares that Acts in violation of this constitution are void, and the courts *shall* so declare them.

A fine statement of the principles upon which the court approached the determination of a case in which the authorities were in conflict is found in Judge Nisbet's opinion in *Lumpkin vs. Mills*.²³ In discussing the question as to whether a surety who had paid the debt was subrogated in Equity to the rights of the creditor, he said:

The early English cases recognize the right of subrogation. Cases of the highest authority in Great Britain, decided since the Revolution, settle the rule differently. The American authorities are in conflict. The Civil Law sustains the rule, and so do

²³ 4 Georgia Reports, 345.

the authorities in those countries where the Civil Law is recognized. We think, upon principle, that the rule of the British Courts anterior to our Revolution is right. The Civil Law is the parent of that rule, as it is, in truth, of many, very many principles of Equity which obtain in the English Chancery Courts. That Code is not of binding authority upon us. But I recognize it in reference to many titles of the law, and among them that of Principal and Surety, the very best extant. Its broader and more reasonable and less fettered Equity is gradually being transferred into American Jurisprudence, and where authorities are in conflict, and principles doubtful, the Court does well to allow the Roman law to quiet the conflict and dispel the doubt. The Roman law goes farther than the Common Law. The surety is not only entitled to the securities, but substituted to the very debt itself. In favor of the surety, the debt is treated not as paid, but as sold to him,— all its obligatory force continuing against the principle, and the surety being viewed in the light of the purchaser of a debt.

It is difficult to decide which is Judge Nisbet's ablest opinion. His colleague, afterwards Chief-Justice Warner,²⁴ seemed to consider that Wilder vs. Lumpkin²⁵ ranked above all others. After showing the distinction between an *ex post facto* and retrospective law, and calling attention to the fact that since the Constitution is silent on the subject retrospective acts might be passed, he held that they could not be operative where "the effect was to impair the obligation of contracts or to divest antecedently vested rights or to violate the great fundamental principles of the social compact," saying:

²⁴ 4 Georgia Reports, 657.

²⁵ 4 Georgia Reports, 408.

"One of the ends of government is to establish justice—justice between individuals. My rights by our rights, according to the compact of government, into which the people of this Union have entered, are to be established and guarded from encroachment—are to be protected from foreign violence; the assaults of our own rulers, and from individual aggression."²⁶ He then quoted from the Civil writers that "a law can be repealed by the lawgiver, but the rights which have been acquired under it while it was in force do not thereby cease. It would be an act of absolute injustice to abolish with the law all the effects which it has produced." And he holds that "Retrospective laws which divest previously acquired rights, upon principle, occupy the same position with *ex post facto* laws, and, aside from the Constitution, such laws are forbidden by the nature of Republican government. They defeat the justice which government in this country is designed to establish."

His most celebrated decision is *Mitchum vs. the State*,²⁷ wherein he discussed forcibly and eloquently the extent of counsel's privilege in argument before a jury, and held that a new trial should be granted where that argument went to the limit of commenting on facts not in evidence. Judge Seymour D. Thompson, in an address before the Georgia Bar Association, showed that this had become a leading case,

²⁶ Page 217.

²⁷ 11 Georgia Reports, 615.

and comments on the fact that the decision had been copied almost verbatim by the judge of another court without giving due credit to the author.²⁸

The author of the article in Livingston's *Eminent American Lawyers* has selected Head vs. Head,²⁹ involving the law of Divorce and its history in ancient and modern times; Edmonson vs. Dyson,³⁰ involving executory devises and the Rule in Shelley's Case, and Neal vs. Farmer,³¹ as cases which show the variety of his learning, and the soundness and strength of his decisions. Culbreath vs. Culbreath,³² is his greatest opinion, according to the general estimate by the Georgia Bar. The question was: "Can a party recover back money paid with a knowledge of all the facts through mistake of the Law?" Before beginning the discussion of the main question, he laid down rules somewhat similar to those in Lumpkin vs. Mills,³³ and said "that he was fully aware that the authorities are in conflict as well in England as in this country."

Great names and Courts of eminent authority are arrayed on either side. It is not one of those questions upon which the mind promptly and satisfactorily arrives at a conclusion. This is true both in reference to principle and authority. It is not surpris-

²⁸ Green Bag, vol. II, 23. The lamented Walter B. Hill has discussed this matter at length and used the parallel columns to substantiate Judge Thompson's statement.

²⁹ 1 Kelley's Reports, 191.

³⁰ 2 Kelley's Reports, 307.

³¹ 9 Georgia Reports, 555.

³² 7 Georgia Reports, 64.

³³ 4 Georgia Reports, 345.

ing, therefore, that Judge Alexander and this Court should differ. I think, and I shall try to prove, that the weight of authorities is with us. If it were not so—if authorities were balanced, we feel justified in kicking the beam, and ruling according to that naked and changeless Equity which forbids that one man should retain the money of his neighbor, for which he paid nothing, and for which his neighbor received nothing. An Equity which is natural—which savages understand—which cultivated reason approves, and which Christianity not only sanctions, but, in a thousand forms, has ordained. In ruling in favor of these actions, we aim at no visionary moral perfectibility. We feel the necessity of practicable rule by which rights are to be protected and wrongs redressed. We know the necessity, too, of general rules, and how absurd would be that attempt which seeks to administer the Equity which springs from each and every case. The insufficiency which marks all law-givers, laws, and tribunals of justice—makes that a hopeless thing. Still, where neither positive law nor a well-settled train of decisions impose upon the Courts a prohibition, they are at liberty, nay, bound to respect the authority of natural equity and sound morality. Where these are found on one side of a doubtful question, they ought to cast the scales.

He then, with the skill of a great metaphysician, shows:

The clear and practical difference between mistake and ignorance of the law. . . . It has been ridiculed as a quibble, but we shall see that it has been taken by able men and acted upon by eminent courts. Ignorance implies passiveness; mistake implies action. Ignorance does not pretend to knowledge, but mistake assumes to know. Ignorance may be the result of laches, which is criminal; mistake argues diligence, which is commendable. Mere ignorance is no mistake, but mistake always involves ignorance, yet not that alone. . . . Mere ignorance of the law is not susceptible of proof. Proof cannot reach the convictions

of the mind undeveloped in action; whereas, a mistake of the law developed in overt act is capable of proof like other facts. . . . No man can be excused upon a plea of ignorance of the law, for disobeying its injunctions or violating its provisions, or abiding his just contracts. He is presumed to know the law, and if he does not know it, he is equally presumed to be delinquent. The principle is of universal application in criminal cases. In civil matters it ought not to be used to effectuate a wrong. That is to say, it cannot be a sufficient response to the claim of an injured person that he has been injured by his own mistake of the law, when the respondent, against conscience, is the holder of an advantage resulting from that mistake. The meaning, then, of the maxim is that no man can shelter himself from the punishment due to crime, or excuse a wrong done to, or a right withheld from another, under a plea of ignorance of the law. The maxim contemplates the punishment of crime, the redress of wrong, and the protection of right. It is reasonable so to construe it, as to apply it to one who has not only done no wrong, and withheld no right, but is himself the injured party, as in this case.

Judge Nisbet's style is that of a great debater, who investigates the question in a calm, impartial and judicial spirit, examines and quotes authorities pro and con, states fully, strongly and fairly both sides of the question, and then, when he reaches a conclusion, sweeps all before him writing with intense vigor in support of that view which, after the investigation, commended itself to his reason and conscience. The result is that his opinions illumine the mind, and both instruct and convince the reader. The student is impressed, not only with the fact that the writer was a great man, but also that he was a great Judge.

GEORGE ROBERTSON.

GEORGE ROBERTSON

From a photograph taken about 1865.



GEORGE ROBERTSON.

1790-1874.

BY

SAMUEL MACKAY WILSON,

of the Kentucky Bar.

GEORGE ROBERTSON, whose name stands first in the list of great men who have occupied and adorned the appellate bench of Kentucky, and whose reputation as a jurist is not confined to the United States, was born in Mercer County, Kentucky, on the 18th day of November, 1790. At the date of his birth, Kentucky was still a part of Virginia, although for nearly ten years continued efforts had been made by the inhabitants to gain a separate and independent existence. These efforts antedated the close of the Revolution; and the desire of the Kentuckians to establish a government of their own was manifested in a series of conventions held in the little town of Danville, in Lincoln County, at irregular intervals running from the year 1784 until Kentucky acquired the coveted dignity of statehood in the year 1792. The settlement of Kentucky did not begin actively nor on a large scale until the year 1775, when the purchase from the Cherokee Indians made at Watauga by Richard Henderson, and the

Harts, Thomas, Nathaniel and David, and their associates of North Carolina, lent a new interest to the development of that part of the unexplored West. It is true that a few explorers and adventurers had invaded Kentucky as early as the year 1748, and Daniel Boone himself had traversed the entire width of the territory in the year 1769. But no consistent or organized effort to conquer and reclaim the unbroken wilderness was begun until the spring of 1775. Between the years 1770 and 1775 a number of surveying parties located and surveyed extensive tracts of land between the Big Sandy and the Cumberland rivers on the north and south, and the Cumberland mountains and the Ohio river on the east and west. But no permanent settlement appears to have been effected during those years. Even after the settlement of Kentucky had begun in earnest with the advent of the Transylvania Company, the war of the Revolution which raged in the east and was accompanied by the horrors of savage warfare in the west, retarded very materially the inflow of the pioneers. The purchase made by the Transylvania Company from the Cherokee Indians, while repudiated by both Virginia and North Carolina, gave a valuable impetus to the settlement and development of the country west of the Alleghanies. It was probably on account of the daring and enterprise exhibited by the men who had engaged in that transaction that the Revolutionary authorities in Virginia inaugurated a counter movement under the leadership of General

George Rogers Clark, which not only resulted in counteracting and checkmating the plans of the Transylvania Company but paved the way for the conquest under Clarke's leadership, of the great Northwest Territory.

The grandparents of George Robertson were a part of the vanguard of civilization which had pushed the boundaries of Virginia's dominion westward to the foot of the Alleghany mountains as far back as the year 1740. It was on the most westerly frontier of the Virginia settlements that his parents were born near the middle of the eighteenth century. They were members of that hardy race which resulted from the happy, though undesigned, combination of the English and Scotch-Irish stocks; and they imbibed on this western frontier the spirit of adventure and that insatiable love of the soil which more than anything else led the early pioneers to seek new homes amid the vast and vacant unappropriated lands of the great west. The parents of George Robertson emigrated in the latter part of the year 1779 to that part of Kentucky which has since come to be known as the Blue Grass region. Without knowing it, they came to face not only the customary dangers of the wilderness but one of the most severe and trying winters that have ever been experienced in that part of the country. So bitter and intense was the cold that it was ever after referred to as "*the hard winter of '79.*"

From this it may be seen that the parents of George

Robertson cast in their fortunes with that of the County or District of Kentucky more than a decade before the future judge saw the light of day. As might be supposed, it was not to escape service in behalf of the Colonies against the Mother Country that these early pioneers left the comforts and the comparative safety of the more settled regions east of the Alleghanies and the Blue Ridge, for the trials and hardships they encountered in the wilderness were foreknown to be inevitable and were incomparably more severe and more protracted than the privations and sufferings endured by the soldiers of the Revolution in the east. The natural hostility of the Indian tribes, who made periodic forays, was aggravated and intensified by the British who had established forts along the waters of the Mississippi, and had allied themselves with these Indian tribes. This unnatural alliance had a most signal illustration in the year 1782 when, at the disastrous battle of the Upper Blue Licks, some of the most able and conspicuous of the Kentuckians suffered a terrible defeat at the hands of the Indians whose invasion and attack had been instigated by British emissaries. This battle was only one of a number of very severe and sanguinary conflicts which occurred between the Kentucky pioneers and the combined forces of British and Indians during the closing years of the Revolution. Following the peace which ended the War of the Revolution, the pioneers were repeatedly subjected to bloody massacres at the hands of their In-

dian foes, and complete relief from this source of danger was not realized until "Mad Anthony" Wayne, in the year 1795, effected the treaty of Greenville, following by the space of a year the decisive battle of the Fallen Timbers on the Wabash.

This abbreviated sketch of the early history of Kentucky has been given for the purpose of showing that the parents of George Robertson were themselves personally identified with the settlement and the important events in Kentucky from the very beginning. Alexander Robertson, the father of George Robertson, was a man of more than ordinary force. He was not only distinguished as a brave and hardy pioneer and a capable and successful farmer, but was recognized by his neighbors and associates as a man of exceptional worth and ability. He was a member of the first county court of Lincoln—afterwards Mercer—County; was elected a delegate to the Virginian Convention in 1788, called to ratify the Federal Constitution, and was also a member of the Virginia House of Burgesses immediately succeeding the sessions of this convention. It is noteworthy that in the convention referred to he voted with Patrick Henry and all the Kentucky delegates, except Rice Bullock, Robert Breckinridge, and Humphrey Marshall, against the adoption of the Constitution. In 1792, he was elected the first sheriff of Mercer County, and this was the last place of public trust he ever held. He died August 15, 1802, when he was not quite fifty-four years old. His wife, whose

maiden name was Margaret Robinson, survived him many years, dying from the effects of an accident in 1846, in the ninety-second year of her age.

In considering the character and influence of Judge Robertson, it is absolutely necessary to a just and proper appreciation of both, that one consider the nature of the ancestry and environment which helped more than anything else to guide and mold his development both as man and jurist. He himself lived to be eighty-four years of age, and from first to last his life and labors were wholly identified with the history of his native state. It was the only country he ever knew. He was not only familiar with the character of her people, but was acquainted with her physical geography and material resources, and, either by tradition or as a participant, he knew every event in her history. To his mother especially he seems to have ever held himself indebted for that intimate knowledge of the circumstances and conditions of Kentucky's early settlement and subsequent growth which throughout life marked his social and official conduct. In his address on the First Settlement of Kentucky, delivered on the 4th of July, 1843, at Camp Madison, Franklin County, Kentucky, before an assemblage of some twenty thousand persons, Judge Robertson speaks to his aged mother in the following touching words:

But among you here is one — the lonely trunk of four generations — to whom the heart of filial gratitude and love must speak out one emotion to-day. Venerable and beloved mother! How

often have we heard from your maternal lips the story of Kentucky's romantic birth — of the "*hard winter of 1779*" — of all the achievements and horrors of those soul-rending days.

You have known this land in all its phases. You have suffered with those that suffered most, and sympathized with those who have rejoiced in well-doing and the prospect before them. You have long survived the husband who came with you and stood by you in your gloomiest as well as your brightest days, and has long slept with buried children of your love; and now the sole survivor of a large circle of contemporaneous kindred, and juvenile friends — a solitary stock of three hundred shoots — with a mind scarcely impaired, you yet linger with us on earth only to thank Providence for His bounties and pray for the prosperity of your flock and the welfare of the land you helped to save and to bless.

Animated as he always was by this spirit of love and devotion to his mother, and by a spirit of patriotic loyalty to Kentucky, which was the natural consequence and accompaniment of such filial devotion, it is not hard to understand why Judge Robertson should more than once have declined positions of trust and of honor which, however flattering to his ambition, must have taken him away from his beloved state.

The early schooling of Judge Robertson was only of such rudimentary character as might be expected in a newly-settled and but partially-reclaimed country. He was fortunate, however, in having the instruction of Joshua Fry, a very accomplished and masterful teacher who conducted a school near the town of Danville, and to whom many of the children of the leading pioneers were indebted for the founda-

tion of their education. Speaking in after years of this period of his life, Judge Robertson said: "I look back at the season of my pupilage under Mr. Fry as the happiest as well as the most eventful portion of my life."

In November, 1805, Judge Robertson entered Transylvania University at Lexington, Ky. His messmates were Robert P. Letcher, Robert P. Henry, Alexander Montgomery, John Speed Smith, Anthony W. Rollins, and others of like social standing, most of whom in after years became distinguished men. He remained at Transylvania until the fall of 1806 without graduating. He would have been entitled to a diploma had he staid five months longer, and this he was importunately urged to do by the faculty. Having a desire, however, to attend Princeton College, whither certain friends had promised to send him, he quit Transylvania University with the intention of striving for scholastic honors at the older institution of learning in the east. The means, however, which his friends had promised to furnish, were not forthcoming, and with his departure from Transylvania his collegiate course ended. Fortunately, however, he did not abandon his studies, but resumed them under the Reverend Samuel Findley, a Presbyterian preacher, then conducting an Academy at Lancaster, Ky., which was extensively patronized. This arrangement continued until the spring of 1807 when he was appointed assistant teacher in the Academy and continued to act in this capacity until the

close of that year. The winter of 1808 was devoted by him to historical and miscellaneous reading, and in the month of April of that year he went to Frankfort to read law with General Martin D. Hardin; not being able to engage suitable boarding, he returned to Lancaster and there studied law in the family of his brother-in-law, Samuel McKee, who was then a member of Congress. Describing his law course, he says:

My studies were solitary and unassisted by the instruction or examination of any preceptor. Frequent conversations with Chief-Judge Boyle, then living near Lancaster, were serviceable to me, and this was the chief assistance I had in my probationary studies. In September, 1809, Chief-Judge Boyle, after a thorough examination, signed my license.

The signature of another appellate judge being necessary, this was shortly afterwards secured from Judge Wallace, one of Boyle's associates, in a manner which Judge Robertson has described amusingly, but with just the slightest touch of bitterness. What followed is best told in Judge Robertson's own words. In his Autobiography, published some years after his death, he has written:

When I was licensed to practice law I was not quite nineteen years old, and I was certainly crude and immature as a lawyer. But feeling a strong desire to assume the responsibility and act on the arena of manhood, I determined to anticipate the growth of a few years and try my fortune, however premature and perilous my lonely start. I had become acquainted with and engaged to marry my present wife, Eleanor James Bainbridge, a daughter of Dr. Peter Bainbridge of Lancaster (who was a cousin of

Commodore Bainbridge), and of Eleanor James McIntosh, the only daughter of General Alexander McIntosh, a wealthy planter of South Carolina. My wife had no patrimony, not a dollar, but she was very beautiful. My father's estate was ample enough to have made all his children rich, but the most of it had been lost by neglect and improvidence before I was old enough to attend to it. I had received none of it. And although my brothers and sisters older than myself had distributed among themselves considerable portions of it and owed me as much as would have made me comfortable and independent, yet I was too proud to ask for, and they were too tenacious to offer me anything. All I ever received of my father's estate was a horse and an old negro man, while my eldest brother, although my father died intestate, received the homestead farm of about 750 acres and some other property.

Yet, thus juvenile, poor and proud, I ventured not only on the rather hopeless prospects of professional life; but on the 28th of November, 1809, when I was only ten days over nineteen years of age, I ventured on the far more momentous contingency of marriage, and, linking my destinies with a wife only fifteen years and seven months of age, we embarked without freight or pilotage on the untried sea of early marriage. I had never made a cent, and had nothing but ordinary clothes, a horse, an old servant, a few books, and the humble talents with which God had blessed me.

My wife and myself lived with her mother until the 9th of September, 1810, when we set up for ourselves in a small buckeye house with only two rooms, built and first occupied by Judge Boyle, and respecting which I may here suggest this remarkable coincidence of successive events: that Boyle commenced housekeeping in that house and while he occupied it was elected to Congress: that Samuel McKee commenced housekeeping in the same house and succeeded Boyle in Congress: that I commenced housekeeping in the same house and succeeded McKee in Congress; and that R. P. Letcher commenced housekeeping in the same house,

and after an interval of two years succeeded me in Congress. I was unable to furnish it with a carpet, and our only furniture consisted of two beds, one table, one bureau, six split-bottom chairs, and a small supply of table and kitchen furniture which I bought with a small gold watch. I had bought a bag of flour, a bag of corn meal, a half barrel of salt, two hams, and two middlings of bacon; and these together with the milk of a small cow given to my wife by her mother and a few chickens and some butter constituted our entire outfit of provisions. *But all our supplies were stolen the night we commenced housekeeping.* This was at that time a heavy blow. I had no money. Though I had good credit I resolved not to buy anything on credit. And that was one of the best resolutions I ever made. It stimulated my industry and economy, and soon secured to me peace and a comfortable sense of independence. In adhering to my privative but conservative resolve, I often cut and carried on my shoulders wood from a neighboring forest. For two years I had but little business in my profession. I was not only too young and crude to expect much, but I was too proud to seek it, and too diffident to manage it in court without agonizing trepidation. If I expected to make an argument, I could scarcely eat or sleep for days preceding the appointed time; and I am satisfied that had I not been a husband lashed on by necessity I never would have practiced law for a livelihood. My experience has convinced me that to assure eminence in that profession both "poverty and parts" are indispensable, and I believe that my poverty did quite as much for me as my parts. . . . Hereditary fortune is oftener a curse than a blessing to its recipients. The best and only reliable capital to start the business of life on is good education, moral and physical as well as intellectual, and domestic as well as academic. A young man thus armed will be almost sure to cut his way and make and save fortune enough. But one without such panoply would scarcely ever make his own or take care of patrimonial fortune.

How I sustained my family until the year 1812 I cannot well explain. Often how, without going in debt which I would not

do, I would be able to procure some necessary supply I could not foresee; but always at the proper time Providence provided the means and pointed out the way, and I lived well and happily. And here candor requires that I should state that I indulged, more from necessity than taste, in some associations and habits the memory of which even yet subjects me to humiliation. Most of my associates frequently spent considerable portions of their time in various games of cards. Not having much business to do I often played with them, sometimes for amusement but generally for money, honorably to be won or lost by fair play and skill alone. I soon acquired extraordinary skill and, with reasonable luck, I was considered invincible by fair means. I never employed any other means, and had by observation and association at the card table become so thoroughly acquainted with human nature in all its multiform phases as to be able to prevent my adversaries from the successful employment of dishonorable artifice or other false means. While I was in the habit of playing, I do not remember that in any one instance I ever lost anything. Our games were generally Loo and Whist, and the betting was on a moderate scale. I almost always won from \$5 to \$50 — sometimes more than \$50, not often less than \$5. I have alluded to this occasional deflection in my early life to explain how for the first three years of my marriage I maintained my family without going in debt. But while I regretted the aberration on account of its pestilent example, I feel no other cause for self-reproach. I never cheated or dissembled or did any other act dishonorable or reprehensible in all my card playing; and it not only kept me from starvation or servile dependence, but made me practically acquainted with the wiles and ways of men to an extent which I could not have otherwise obtained.

With the opening of a Government land office at St. Louis for the sale of the public lands in Missouri, Judge Robertson was offered by Mr. Gallatin, then Secretary of the Treasury, the appointment of Regis-

ter, but the imminent prospect of a war with England deferred the establishing of this office; and, as the position did not promptly materialize, Judge Robertson in 1812 abandoned all purpose of removing to Missouri, and determined to rely for his support upon his profession alone.

About this time he accepted from the circuit judge of his district the office of prosecuting attorney for Garrard County, and devoted himself thenceforth sedulously to the law. He soon received encouraging patronage, and was cheered with assuring prophecies of success. He did succeed, and it was not long before he was engaged in nearly all the litigated causes in that part of the state. In reference to the early years of his practice, we cannot do better than by quoting Judge Robertson's own words on the subject:

I never encouraged a litigious spirit, often induced antagonist parties to compromise, and oftener induced forbearance in frivolous and vindictive cases in which the least professional countenance would have bred vexatious litigation. I had more success in argument before the court than a jury. I never had much of the *ad captandum*. I was quite fluent and was accurate in style and pronunciation. I relied on lucid order and the logic of ideas, on the law and the facts. I never wrote out or committed any portion of a speech at the bar, nor was I accustomed to take notes of the testimony, finding that they confused and diluted my argument. I generally relied altogether on my memory, which whenever it was my sole reliance never failed as to any material fact or witness; and thus retaining all that was essential, and unembarrassed by non-essentials, my memory was more vivid, my ideas more consecutive and clear, and my argument more vigorous, con-

centrated and impressive. I was a clear, chaste and ingenious debater, but was never what is generally considered an orator. I succeeded in many hopeless cases, and but seldom lost a good one. I charged low fees, and was so indulgent in the collection of them as to lose about half of my earnings. I never deceived a client, nor played on his ignorance or fear or confidence in me to extort an exorbitant fee and invariably when I had done a client's business without a special contract I charged the minimum fee for the like service. As early as 1815 I had by study and practice become a good lawyer, and when only twenty-five years old I thought I knew more law than I think I do now at the mellow age of sixty-eight. This was not the effect of juvenile vanity so much as of comparative ignorance; and my case in that respect is every man's case who progresses in knowledge. The sciolist is dogmatic and vain because he is ignorant of the vast field of knowledge unseen by his circumscribed vision. The higher he rises the more extended becomes his horizon of unexplored knowledge; and the more he learns, the more he feels the insignificance and uncertainty of all human knowledge compared with a philosophical cyclopædia of universal truth; consequently the more he knows the more he sees which he does not know, and his humility increases *pari passu* with his progress in true science.

In 1814 Judge Robertson was appointed principal assessor of the Federal direct tax for his congressional district. The duties of that office engaged a large portion of his time for about a year and enabled him to make nearly \$1,200 and extend his acquaintance with the people of the district. In connection with this office he has recorded the fact that the manner in which he fulfilled the trust and mixed with the people in a sincere, straightforward, and affable spirit commended him to their approval and greatly increased his popularity. At the same time

he continued to argue causes at the bar. A rather notable incident in his life occurred in the year 1815 when he appeared in the Mercer Circuit Court for the first time as sole counsel for General Thomas Kennedy, in an action of detinue brought against him by Edward Worthington for about fifty valuable slaves. Describing his connection with this case, Judge Robertson has said:

Rowan, James Haggin, and several other distinguished counsel appeared for Worthington. I had confidence in my case which turned, as I thought, on the legal question whether an oral gift to Mrs. Worthington in Virginia since 1758 and when she was an infant in the family of her father, under whose transfer General Kennedy claimed the descendants of a female slave so given to the child, was valid against *bona fide* purchasers from her father. Being comparatively young, at a strange and celebrated bar, and standing alone against such an array of the most distinguished lawyers in Kentucky, and in a cause so important, I advised my wealthy client to employ some assistant counsel. But having been successful for him in other cases he ignorantly thought that I could not fail in a good cause, and would stake his fifty slaves on me alone. When the plaintiff closed his evidence I moved for a non-suit, which motion after elaborate argument was sustained by Judge Kelley who, although a brother-in-law and admirer of Rowan, was also my friend, and firm and impartial in his judgments. My argument and success in that case gave me great *éclat* and more reputation than I deserved.

Judge Robertson had now acquired considerable reputation as a lawyer, and his practice had been established upon a firmer footing. Although he had at that time no political aspirations, his brother-in-law, Samuel McKee, then a representative in Congress,

having concluded to resign this office, it was suggested by certain friends and admirers of Judge Robertson that he offer himself as a candidate. This he did and in a short time a number of formidable competitors were in the field. After a very warmly contested canvass Judge Robertson was elected by quite a handsome majority. No small part of his success in this campaign was attributed by him to his ability as a fiddler. On one occasion during the canvass there was a public speaking by the several candidates at Manchester, the county seat of Clay County. The competitors of Judge Robertson were both well known and quite popular in this county, whereas Judge Robertson himself was almost an utter stranger. The other candidates, moreover, had been ahead of him in meeting and mixing with the assembled crowds and in urging their respective claims for the coveted honor. Nevertheless Judge Robertson delivered a speech in the courthouse yard which made a very satisfactory impression. Without expecting much from the effort, he was about to return homeward when he noticed a crowd gathered in the public square around a man who was industriously playing a fiddle. It so happened that when he approached the fiddler, a gentleman who had heard of his accomplishments in that direction suggested that he play them a tune. Judge Robertson felt some natural embarrassment at the thought of fiddling his way into Congress, but responded that he would with pleasure do the best he could, assuring them, however,

that he could not hope to equal their Virginia musician. Accordingly he took the backwoods fiddle and started off with an old Virginia reel. He did his best and played the tune with variations in such a style as to transport with obstreperous joy the whole crowd. The original performer was kicked out and told that he was no fiddler, and the crowd was so delighted at the unexpected entertainment that Robertson was compelled to remain for two or three days and share their hospitality. Many of them declared that he should be elected, and swore that they would go with him to Washington just to hear him play and to dance to his music on the way. Knowing the popularity and other advantages of his competitors he expected that the good impressions made by his speech and music would be fugitive, and soon give way to counter influences, especially as this was his first and only visit to Clay County. Of the three men who remained in the race to the end, John Speed Smith withdrew on the eve of the election, and Major Robert Caldwell and Judge Robertson fought it out alone. Judge Robertson received about eight hundred votes in Clay County, and Caldwell only about seventy.

During the session of the Kentucky legislature, commencing the first Monday in December, 1816, a resolution passed the House of Representatives for a new election of Governor over the head of the Lieutenant-Governor, whose term of four years had just commenced. This led to a popular excitement

which agitated the state almost to revolution for more than a year. In the summer of 1817 Judge Robertson wrote an argument against a new election over the signature of "A Kentuckian," which the party holding that view had published and extensively circulated in pamphlet form. It apparently turned the tide against the movement for a new election, and added greatly to Judge Robertson's reputation. Thus he took his seat in Congress on the first Monday in December, 1817, under auspices peculiarly encouraging. He was placed on the Committee on Internal Improvements, then one of the most important, especially as the President (Monroe) had in his first message attempted to forestall Congress by an argument against the constitutionality of congressional appropriations for national improvements, and with this position the Committee was destined to take issue. During the session, which closed in May, 1818, Judge Robertson acquired an enviable reputation as a parliamentarian and debater. In April of this year, in company with his friend and colleague, Richard Clough Anderson, he made a visit to Philadelphia, where they remained for a week taking in the sights of the city. An incident occurred on this trip which is worth recording, and which is related by Judge Robertson:

At the first dinner after our arrival in Philadelphia, an incident occurred which was rather embarrassing to me. A few minutes after our names had been registered, dinner was announced. On entering the dining saloon I discovered a brilliant party,

consisting chiefly of foreign diplomats and naval officers, and I saw that every plate except Anderson's and mine was served with bottles of various wines. This was what I had never seen before. Without inquiry or reflection, I supposed that wine was a part of the dinner, and was for convenient use placed at each plate; and that the only reason why our two plates were not supplied like all the others was that the dinner service had been completed before we arrived. With that impression, I bowed to a naval officer to my left (Commodore Chauncey, I think), and asked him to join me in a glass of wine, he having three bottles and I none. After a momentary pause of evident surprise, in which the other guests seemed to sympathise, he courteously assented, and requested me to choose my wine. I shortly afterwards proposed a glass to Anderson, which he significantly declined, having, as I also had, discovered, by the impression my blunder had made, that all was not *à la* Chesterfield. As soon as I had dined I reprimanded the *major domo* for not furnishing me with wine. He, instead of replying that I had ordered none, apologized, and promised that if I would excuse him I should have no further cause to complain, and inquired what kind of wine I would have for dinner next day. I ordered a bottle of Madeira and another of Sherry, intending to redeem my character next day. But, to my regret, my neighbor was gone, and I have no doubt that he often told the ludicrous anecdote about the young member of Congress from the backwoods of Kentucky.

In May, 1818, Judge Robertson returned from Washington in company with his fellow congressmen, Colonel Richard M. Johnson and John J. Crittenden; and as this was his first long absence from home, his emotions on coming in sight of his native state may be better imagined than described. On reaching home he learned that his old rival, John Speed Smith, proposed to contest his seat, but, after

a short canvass, Smith again declined the issue, and Judge Robertson was reëlected without any opposition.

The most important service rendered by him during his second term was his speech against intervention by the general Government with slavery in the then newly-organized territory of Arkansas, and the part he took in reforming the system of selling the public lands. The latter measure, although vigorously opposed by Henry Clay, and as vigorously maintained in a speech of three hours' length by Judge Robertson, he was wont to regard as one of the most beneficent laws ever enacted by Congress.

Without any solicitation or effort on his part, Judge Robertson was elected to Congress for a third term, but on returning home, at the close of his second term, he determined to resign his seat. Pleased with political life and with his encouraging prospects, had he been in affluent circumstances or unencumbered by a family, he would doubtless have preferred to continue in public life. But, under the stress of poverty, and the demands of a growing family, he felt that this paramount and sacred obligation demanded the sacrifice of all political prospects; and for these weighty personal reasons he decided to devote himself to his profession and to the service of his wife and children.

In the spring of 1821, he resumed the practice of law, and soon had as much employment as he could well attend to. Governor Adair, though of opposite

political affiliation, offered him the attorney-generalship of Kentucky, which he declined. After this declination he tendered him the judgeship of the Fayette Circuit Court, backed by an offer from the Trustees of Transylvania University, of the professorship of law in that institution, both of which Judge Robertson also declined. But the purpose he had in view when he resigned his seat in Congress was in a great degree frustrated by his Garrard County constituents, who, in 1823, sent him, *willy nilly*, to the Lower House of the Kentucky Legislature to help guide the ship of state through the "Relief" and "Anti-relief" and the "New and Old Court" storm which had then commenced to rage, and which he rode out until 1827, when it was lulled by the final triumph of the constitution. During three years of this service he was Speaker of the House of Representatives, and during the whole of it was almost incessantly engaged on the stump, through the press and in the legislature in debating the constitutional questions which agitated the state more than it was ever convulsed before and the like of which has never been seen since, except possibly during the political campaigns of 1896 and 1899. During that trying period Judge Robertson had to neglect his practice to such an extent as to leave him but little profit from that source, but in the spring of 1827 he resumed the practice of law with renewed energy and even more encouraging prospects. His desire for material independence might soon have been gratified had he

been able to persist in his resolution of denying himself to all political and official allurements. In conformity with this resolution, he declined the nomination by his party (the Whig) for the office of Governor in the year 1828. General Metcalfe, having been substituted and elected, urged him to accept the post of Secretary of State, but this he declined. But his party having imperatively required his acceptance, he finally did accept and was preparing to settle in Frankfort, when, treating him as a leader whose services they claimed the right to call into any field of labor, his party again overruled his will and called him to the appellate bench, then by far the most onerous and irksome, and, in his then circumstances, the least welcome to Judge Robertson of all important and honorable public trusts. Strange as it may sound in the light of his after life, Judge Robertson has recorded the fact that at this period of his life he had no taste for judicial service. The labors of an appellate judge in Kentucky were then almost herculean; the salary, nominally \$1,500 but worth less than \$1,000 in actual specie, was grossly inadequate. And at the same time he realized that by going on the bench he would not only make an immense pecuniary sacrifice, but also be doomed to exclusion from popular favor, and subjected to an unwelcome deprivation of social and personal liberty. He therefore recoiled from the prospect of such a career. But the defeated party had a small majority, and as Judge Robertson was not un-

acceptable to them, his own party demanded that he accept the nomination for the office. This demand was so imperious as to leave him no other honorable alternative. He accepted the office, however, upon the assurance that he might resign at any time after one year's incumbency. Upon his appointment, Chief-Justice Bibb, who had been the leader of the opposing party, resigned. His place was not filled until the 16th of December, 1829, when Judge Robertson was commissioned Chief-Justice of Kentucky, his commission as judge bearing date December 24, 1828. During an interval of nearly a year between these commissions, all the heavy duties of the court devolved on him and a single associate, Judge Underwood; and the business of the court was so exacting that they had scarcely a single day of relaxation, and scarcely a single night of undisturbed repose. Judge Robertson has said of this first period of his service on the bench that—

I often tried to abdicate but was always overruled, until the first of April, 1843, when, the Governor again declining to accept my tendered resignation, I filed it myself in his office and left the bench. I thus unexpectedly and unwillingly devoted nearly fifteen years of the prime of my life to incessant and self-sacrificing labor on the appellate bench, and resumed my mental and locomotive liberty, poor and fifty-two years old. . . . How I discharged my judicial duties, my reported opinions may partially serve to show, and how my professional functions, the public verdict will decide. All I can say is, that in these as well as in other relations of public and private life I had studied only my duty, and faithfully tried to do it to the full measure of my abilities.

During my service on the bench I could have been elected to the United States Senate twice beyond question, if I had consented; and on another occasion I would have been elected without my knowledge had not my brother-in-law (Letcher) withdrawn my name from the balloting, after which J. T. Morehead was elected.

All I am now worth and much more given to my children and paid for or to friends, I have made by a voluntarily limited practice of the law for about twelve years since 1843, having chosen almost total retirement for the last six years.

In December, 1834, Judge Robertson accepted the professorship of constitutional law, equity, and international law, public and private, in the law department of Transylvania University, and on the 4th of July, 1835, he settled permanently in Lexington, where, with the exception of the years spent at Frankfort in his subsequent service on the bench, he continued to reside during the remainder of his life. This professorship he retained until 1858, and during the course of it helped to furnish legal instruction to more than twelve hundred prospective lawyers scattered throughout the United States, but principally in the southern, western and northwestern states and territories. Many of these youths in after years became distinguished jurists and statesmen, occupying places at the bar, on the bench, and in the legislative councils of the states and nation. A number of the lectures delivered by Judge Robertson to his law classes at Transylvania University have been preserved by him in his published "Scrap Book." All of them are most interesting and instructive. Not the least important was a valedictory address delivered

to the senior class of the Transylvania Law School at Lexington on February 23d, 1847, in which Judge Robertson undertook to outline a code of ethics for the legal profession. In the opening part of this address he states that it was part of a similar address delivered some ten years before that. Hence the original address must have been delivered in the year 1837. Judge Sharswood's famous little book on Professional Ethics appeared in 1854, so that it is apparent that what Judge Robertson had to say was said, and they were his sentiments, long before he could have had access to, or an opportunity for consulting, the book by Judge Sharswood, or for comparing notes with him. The rules laid down by Judge Robertson and described by him in the phrase "Forensic Ethics," may be epitomized thus:

1. To be a gentleman;
2. To deal fairly with and by one's clients;
3. To yield due deference to the courts and to demand a corresponding respect from the courts;
4. To be courteous, just and honorable in one's intercourse with professional brethren;
5. To avoid avarice—"A lawyer can hardly be both mercenary and just;"
6. To insist, nevertheless, on adequate compensation for services fairly rendered;
7. Never to drum for clients;
8. To frown down all pettifoggery.

Another notable lecture delivered by him to the Transylvania law classes and preserved in his "Scrap Book" is that on the powers of Congress and the

Resolutions of '98, delivered on November 4th, 1852. This lecture is especially interesting inasmuch as the doctrine of nullification is inevitably embodied in the Resolutions of '98, which were doubtless inspired by Mr. Jefferson, but which were adopted and promulgated by the Kentucky Legislature, and are claimed to have owed their origin to Kentucky authorship. The views expressed by Judge Robertson in this lecture were anticipated and voiced in no uncertain manner by William Murray, that able member of the Kentucky bar, who opposed their adoption most manfully but almost alone at the time they were first introduced in the Kentucky Legislature. The services rendered by Judge Robertson as a professor of law in the Transylvania University were practically without compensation and brought no rewards beyond the satisfaction of aiding the many young men who came under his instruction in preparing themselves for lives of usefulness and honor in the profession. These services, quite as much as his work upon the bench, have earned for him peculiar distinction among the great men of Kentucky, and by them more than by his more conspicuous services on the bench was he endeared to the young lawyers of his own and succeeding generations. In their character and extent they are only comparable to the like service rendered by George Nicholas, that great Virginia lawyer who had acquired fame and high honor in Virginia before he came to Kentucky with the very earliest pioneers and gave to the rising common-

wealth the benefit of his extraordinary ability and rare experience in drafting its first constitution, and in helping to put that constitution and the laws established under it into successful operation. George Nicholas, under more difficult and trying circumstances, was the able and beloved preceptor of nearly all of the first lawyers of Kentucky who acquired their legal education after settling in the state, or after being called to the bar and his premature death in the year 1798 was a great loss. And perhaps equally deserving of mention in the same connection is Chancellor Henry Pirtle of Louisville, to whom a great number of lawyers throughout Kentucky and the southwest owed their legal training. It is a singular fact that these two great men—Robertson and Pirtle—while similarly distinguished as preceptors in the law were, in a way, the rivals of each other in the matter of judicial opinion.

After serving at intervals in the Kentucky Legislature, at the August election, 1864, Judge Robertson was again elected to the office of appellate judge. This is said to have been done much against his will, and took him greatly by surprise. It seems that the office was unwelcome to him, and the duties peculiarly irksome and onerous. Accepting the appellate judgeship the last time with extreme reluctance, and satisfied that he could not continue to hold it without too great sacrifice, he resolved to abdicate as soon as he could fittingly do so. For seven years, until September, 1871, he continued to discharge the duties of

his high office. In the month of February preceding his resignation he suffered a slight stroke of paralysis which crippled his limbs but did not perceptibly impair his mind. Though enfeebled by age and wasted by disease, his mind upon his retirement from the bench seemed to be as active as ever, though somewhat wanting in elasticity and vigor.

It has been said (with how much truth we do not know), that during the early years of his incumbency of the bench he made a practice of briefing for himself both sides of every cause which came before him for decision. He would assume the place of advocate on the one side and summarize the points in favor of that side, and then would undertake to present the arguments in favor of the opposite view. By this method he was enabled the more surely to evolve the real merits of every case which came before him. Describing his habits on the bench, he has said:

My habit of writing, like that of reading, was rapid and irregular. Whatever I wrote was accomplished *per saltem*, without copying or much revision. I wrote with too much celerity. Even my judicial opinions, though well considered and matured before I put pen to paper, were written *currenti calamo* so as to finish in an hour what might prudently have occupied a whole day. As an illustration, I will only say that the opinion in the purpresture case of Lexington & Ohio Railroad vs. Applegate, etc., covering 22 pages, in 8 Dana's Reports, page 289, was written out from beginning to end in six hours. The duties of the appellate bench when I was upon it, the first time especially, were exceedingly onerous and required extraordinary dispatch to avoid vexa-

tious delays. Anxious to keep up with the docket I have often labored at the oar all night; and, whether at home or at court, I seldom enjoyed even the rest of one Sabbath day for nearly fifteen years. My labors were constant and herculean; and I regret that I permitted my anxiety for the dispatch of justice to jeopardize my health, disturb my comfort, and subject my judicial reputation to unnecessary criticism.

The first period of his judicial career begins with *Hickey vs. Young*, reported in the first volume of J. J. Marshall's Reports, and extends through the seven volumes of those reports, the nine volumes of James G. Dana, and the first three volumes of B. Monroe, ending with *Bentley vs. White*.¹ The second period begins with *Adams vs. Adams* in the first volume of Duvall's Reports, and, extending through the two volumes of A. Duvall and the first seven volumes of W. P. D. Bush, ends with *McCormack vs. Clarkson*.² Of these reports it was Judge Robertson's opinion that Dana's were the best, both in execution and in the character of the cases. Of the decisions in Dana, it has been reported of Judge Story that he said they were the best in the Union—and of Chancellor Kent, that he knew no state decisions superior to them; and Kent, in his Commentaries, has made frequent reference to opinions of Judge Robertson, and has commended them in flattering terms.

The Kentucky Court of Appeals, during most of the time Judge Robertson was connected with it, con-

¹ 3 B. Monroe's Reports, 263.

² 7 Bush's Reports, 519.

sisted of but three judges, who were so ill paid as to have to resort to other means of earning a living, and so hard pressed as to have but little time to devote to single cases; its bar was never without able lawyers, but very many of the cases were hastily and imperfectly prepared. His first labors were peculiarly arduous, nevertheless his earliest decisions show that his legal learning was both comprehensive and accurate. In the case of Breckenridge's Heirs vs. Ormsby,³ and in Lampton's Executors vs. Preston's Executors,⁴ are exhibited the same perspicacity and completeness that are found in his later opinions. Opinions running through some twenty-eight volumes of the reports, well argued, often exhaustive, though betraying marks of haste resulting from pressure of business, show that he performed his full share of the known duties of the court, but do not disclose his labors in deciding the far greater number of cases which have never been published.

In noticing the characteristics of Judge Robertson's intellect, no one can fail to be struck by its precocuity; especially when taken in connection with the great age which he attained and his continued activity to the last. He ripened early, and he hung long upon the bough. At his first appearance in the arena of politics he was already a strong and fully developed man. His writings and speeches at that early time seem to be as ripe and as free from boyish crudities

³ 1 J. J. Marshall's Reports, 236.

⁴ 1 J. J. Marshall's Reports, 454.

as the productions of his later years. Perhaps much of this effect is due to the thoroughness of his legal studies and to the ardor of his devotion to his profession. But it is noticeable that amid all the dry-as-dust work he had to do he never lost his taste for the graces of composition. This is evinced by everything he has left behind him. And he scarcely ever wrote an opinion whether long or short that it was not somehow, somewhere marked by a peculiar felicity of expression which sticks in the memory even after the principle involved in the decision may be lost. It is not an unusual thing to meet in his legal arguments and judicial opinions flowers of rhetoric and touches of sentiment which in such places almost excite exclamations of surprise. His reading was extensive and thorough and his general information, derived from observation and experience as well as from books, was little less than phenomenal. He read with avidity every accessible authority relating to the social and political condition of America, and was personally familiar with the fascinating annals of Kentucky. Among the first books he ever owned were a Latin copy of Justinian's Institutes, Pothier on Obligations, and Vattel's Law of Nations. Many of his terms, illustrations, and reasons are drawn from the civil law, concerning which he said: "The common law not only has been greatly improved by a commixture with the civil law, but is yet susceptible of still more improvement by the same process." He placed a high estimate upon Comyn's

Digest, the writings of Pothier, and the English Ecclesiastical reports. The latter, according to his judgment, contained some of the finest models of judicial style. He had studied, with much profit, the biographies of the great judges, both of England and America, and no feature in his opinions is more marked than the frequent and appreciative reference to the English decisions and to the weighty utterances of its great law-writers and judges. The bent of Judge Robertson's mind was always toward large views of the questions that were brought before him. He seemed to take pleasure not in avoiding difficulties and intricacies, but in grappling with and solving them. It came natural to him to rest every case upon the deepest principles involved in it, to hold it firmly on them, and to decide it by them instead of to send it off on some shallow quibble or mere technicality. If there was anything in a case that went down into the depths and the obscure places of the law, it was always possible, nay, it was always easy, to get him to see and acknowledge the fact and to guide his researches and reflections accordingly. Many of his briefs as counsel and of his decisions as judge have attracted attention beyond the confines of the state. One of his most celebrated briefs was that for the appellant in the case of Russell vs. Southard, on the admission of evidence to alter a deed which he gained before the Supreme Court of the United States. Perhaps the most famous of his earlier decisions was that in the case of Dickey vs. The

Maysville & Lexington Turnpike Road Co.;⁵ and quite as celebrated was that of Lexington & Ohio Railroad Co. vs. Applegate.⁶ Among his later decisions that in the case of Griswold vs. Hepburn,⁷ in regard to the constitutionality of the legal tender act passed by Congress near the beginning of the Civil War, upon the recommendation of Secretary Chase, is the most conspicuous. The doctrines laid down by him in this case were afterwards affirmed by the Supreme Court of the United States in Hepburn vs. Griswold.⁸ The question involved in this case was perhaps the greatest question in the history of American constitutional law, in so far as the powers of the Federal government have been concerned. Nevertheless the views entertained by Judge Robertson and at first approved by the Supreme Court were not destined to stand, for, in the Legal Tender Cases,⁹ the Supreme Court upheld the constitutionality of the act involved, Justice Samuel F. Miller, himself a Kentuckian, siding with the majority, and so far vindicating the view held by Chancellor Pirtle who presided in the trial court when the question first came up for decision in Griswold vs. Hepburn. If Judge Robertson's views had been adhered to by the Supreme Court, it is safe to say that subsequent derangements in the financial condition of the country

⁵ 7 Dana's Reports, 113.

⁶ 8 Dana's Reports, 289.

⁷ 2 DuVall's Reports, 20.

⁸ 8 Wallace's Reports, 603.

⁹ 12 Wallace's Reports, 457.

would not have occurred, and we should hear less of prevalent heresies as to what constitutes money.

Whatever may be the dividing line between the authority of precedents and the authority of reason, it cannot be denied that the latter holds a prominent place in a science which professes to be the perfection of reason and the collected wisdom of ages. Judge Robertson has expressed his views on this subject frequently and in no uncertain terms. In speaking of what he was wont to call "the malleability of the common law," he said:

An adjudged point, unreasonable or inconsistent with analogy or principle, should not be regarded as conclusive evidence of the law, unless it shall have been long acquiesced in, or more than once affirmed — and unless, on a survey of all material considerations, you feel that it is better to adhere to it than, by overruling it, to produce uncertainty and surprise. *Stare decisis* should be thus, and only thus, understood and applied. Stability and uniformity require that authority, even when conflicting with principle, should sometimes decide what the law is. But, in all questionable cases, follow the safer guides — reason and the harmony of the law in all its parts.

And again, in emphasizing this "malleable" quality and the adaptability of the common law to the constantly changing circumstances and conditions of society, he has said:

In consequence of this, it has been greatly improved from age to age by judicial modifications corresponding with its reason and the spirit of the times, yet the judge who leaves it as he finds it is at least a safe depository. He is neither a Mansfield nor a Hardwicke — he is more like Hale and Kenyon. If he does not im-

prove, he does not mar or unhinge the law. It is safer and more prudent to err sometimes in the recognition of an established doctrine of the law, than to make innovation by deciding upon principle against the authority of judicial precedents.

This attitude toward the common law is further illustrated in the notable opinion rendered by Judge Robertson in Lexington & Ohio Railroad Company vs. Applegate, etc., reference to which has already been made. In that case he said:

The onward spirit of the age must, to a reasonable extent, have its way. The law is made for the times, and will be made or modified by them. The expanded and still expanding genius of the common law should adapt it here, as elsewhere, to the improved and improving conditions of our country and our countrymen. And, therefore, railroads and locomotive steam cars — the off-springs, as they will also be the parents, of progressive improvement — should not, in themselves, be considered as *nuisances*, although in ages that are gone, they might have been so held, because they would have been comparatively useless, and therefore more mischievous. We know that a zealous and inconsiderate spirit of innovation and improvement requires the vigilance and restraint of both reason and law. We are fully aware, also, of the fact that, when such a spirit is abroad, private rights are in peculiar danger, unless sternly guarded by the judiciary; and we are not sure that such guardianship is not most needed in a government where whatever is popular is apt to prevail, at first and often at last, only because it is *vox populi*.

In a response to a petition for rehearing in one of his earlier cases, he says:

The practice we have discontinued was unreasonable; it was peculiar to this State; it could not promote the ends of justice; it would frequently promote injustice and irreparable injury

without any reason for it. The rule was old, but its antiquity alone does not commend it. It is not sacred and inviolable merely because it is ancient; error is not less error because it is gray with age. Time, which makes it venerable, renders it more alarming and mischievous.

He gave new meaning and scope to the doctrine of fellow-servants and the resulting liability of the common master; his views on the effect of monomania or mental delusion, as applied both to contracts and to crime, were profound and far-reaching; his treatment of the laws of marriage and divorce and of all those vital questions affecting the domestic relations, was pitched upon a high plane and looked not only to the comfort and happiness of the individual, but to the welfare of the state. In opposition to the then generally-accepted doctrine that ignorance of the law excuses no man, he held that where it is perfectly evident that the only consideration of an alleged agreement was a mistake of the legal rights and obligations of the parties, the agreement may be avoided on the ground of total want of consideration or mutuality. This, however, is as far as he would sustain a defence founded on the plea that there had been a mistake of law, and it has ever since been recognized as the true principle. In pursuance of the settled proposition that fraud shall not be presumed, he repudiated the distinction, taken in early Kentucky cases, between a *suppressio veri* and a *suggestio falsi*, which required evidence of knowledge of the truth in the one case and not in

the other, and affirmed, on the other hand, that actual fraud is a wilful misrepresentation of facts, or a fraudulent concealment of them, with a view to deceive, and that a party, by making representations of facts which he honestly believes to be true, is guilty of no moral turpitude and incurs no legal responsibility. That drunkenness, in at least some cases and for some purposes, was admissible in mitigation in criminal cases, was the logical sequence of very many of Judge Robertson's opinions. Not being a man to halt midway in an argument, or who could refuse to apply a conclusion which he had labored so often to establish, he rendered the opinion of the court that, under proper qualifications, drunkenness, resulting from a desire for mere social enjoyment or sensual gratification, may be given in evidence, under the plea of not guilty to a charge of murder, and may, if from all the circumstances the jury shall so consider, reduce the offense to manslaughter. This is as far as he was asked to go, and, regarding expediency as not a subject of judicial consideration, the conclusion would seem to be inevitable. Nevertheless, the position which he had thus boldly taken on this momentous question was afterwards retracted by the same court, substantially upon the ground that, however logical Judge Robertson's conclusion might be, the doctrine was dangerous and inexpedient. The dogma of implied malice was let in to counteract the doctrine that held the perpetrator of a crime irresponsible if the deed

was the result of drunkenness voluntarily produced though without any intention to commit a crime.

His opinions penetrate into almost every department of jurisprudence. Those upon the meaning of statutes, and upon rules of practice and pleading, exhibit his ingenuity and capacity for details, while those upon the leading principles of equity, constitutional, and international law, give most room for his discursive powers, and show to the best advantage the range and rigor of his intellect and the extent of his erudition. The appointment of Robertson as chief-justice may be said to mark the close of the controversy between the Old Court and the New Court parties and to have completed the triumph of constitutional government in Kentucky. For fourteen years he sat upon the bench of the Court of Appeals as its chief-justice, adorning it by his learning and power of logical analysis, and giving form and consistency to the statute law of the state. Elected to the Court of Appeals again in the year 1864, at a critical period in the history of the state, when he had attained the ripe age of seventy-five years, it was his rare good fortune, as a member of that Court, to have to defend again the principles for which he had battled vigorously in his youth. He rendered incalculable service in those distracting times in contributing to the speedy and harmonious readjustment of affairs in Kentucky, following the war and the liberation of the slaves. A vigilant and attentive observer of men and measures,

he discussed from the platform and through pamphlets and the press most of the great public questions which were agitated during his times. This is attested by his various published addresses and by his letters and pamphlets on the theory of popular government, on the "relief" laws, the tariff or "the American policy," the Missouri Compromise, and squatter sovereignty, common schools, against the constitution of 1849-50, against an elective judiciary, on nullification and secession, the doctrine of the binding force of instructions to a representative by his constituents, the Dred Scott decision, slavery and emancipation, and many others. While the years of his practice at the bar more than equaled his service upon the bench, the only one of his addresses to the jury now remaining is his remarkable speech in defence of Dr. Abner Baker. This argument, however, furnishes a fair specimen of his resources as an advocate. Four times he declined appointments to the federal cabinet, and twice a seat on the bench of the United States Supreme Court.

Possibly his mere words may die, and his opinions as such may cease to be cited; possibly the day may come when his name will be spoken no more; but the principles he so largely helped to establish must continue to exert their own influence on the jurisprudence of our state for many years yet to come. Happy indeed was he in his destiny. Few men have been more blessed in the fruitfulness of their works, or the richness of their remuneration. Judge Rob-

ertson was a man of remarkable native talent, an untiring student, and possessed with a singular power of convincing men. In every department of effort in which he was called to serve, he distinguished himself. As a Member of Congress and of the Kentucky Legislature, he was remarkable for his ability and mastery of the details of legislation, as a publicist he was in advance of his generation, as a lawyer he held his own with the best and brainiest, but as a judge he far outshone all his contemporaries. It was in this capacity that he made for himself an enduring fame. While Chief-Justice of Kentucky he rendered decisions that have no superior in the history of jurisprudence, and are quoted as authority wherever the English language is spoken. After his death it was said of him that he had done more for Kentucky jurisprudence, more to give it form within the state and fame abroad, than any other judge—perhaps than all other judges together—that have ever sat in the Court of Appeals. Other men may have had excellencies which he did not have; other men may have been free of faults which he had; but, take him as he was, with all his faults and all his virtues, with his intellectual strength and his intellectual weakness, Kentucky has produced from her soil, distinguished as many of them have been in every department of life, no son whose name she inscribes higher on her roll of the distinguished dead.

From the proceedings had in the Court of Appeals

of Kentucky on the occasion of his death, the following extracts, which accurately set forth his characteristics as a Judge, are taken from the response by Chief-Justice Hardin:

But it was as a member of this court, more perhaps than in any other sphere, that Judge Robertson rendered his greatest service and was most permanently distinguished. It requires a mere reference to its published decisions, rendered during his long and faithful service on the bench, to show how justly he was entitled to the high character now universally accorded to him for great labor, great learning, and great and varied natural gifts.

In his profession, or connected with it, whether as a practitioner at the bar, as a judge, or a teacher of law, he was ever indefatigable in the discharge of his duty. It was but a work of pleasure for him to explore the vast fields of jurisprudence, going in his researches often far beyond the range of those of his predecessors and contemporaries; and when his investigation had resulted in conclusions of his judgment, those conclusions were adhered to with great firmness, and unhesitatingly expressed and given to the public in a style almost unparalleled for its elegance and beauty of diction, as well as perspicuity and force. . . . For urbanity, amiability, and deference to his associates his character was as distinctly marked as it was for firmness and fidelity to whatever he conceived to be his official duty; even while bearing the weight of over four-score years, and the cares and worries incident to so long a life, his affability and natural kindness seemed unabated; and he continued to labor in the public service apparently with as much alacrity as if in the prime of life. But, like Marshall and Kent and Story and Taney whose great lives were devoted to the development and expansion of American jurisprudence, Kentucky's great jurist now sleeps well from his labors, having by them written his own best history, and erected his most enduring monument.

It is but just to say, in conclusion, that the materials for this imperfect sketch have been drawn largely from Judge Robertson's own writings, particularly his "Autobiography," "Scrap Book," and reported decisions. In describing his personality, his attainments, and the character and impress of his work, the language used has been in large part adopted from the estimates of his life and labors, of which a great number appeared shortly after his death. No eulogy to Judge Robertson, however, could be more fitting than that pronounced by him on another gifted and favorite son of Kentucky in these words:

His reported opinions are equal, in most, if not in all, respects, with those of any other judge, ancient or modern, and will associate his name, in after times, with those of the Hales and the Eldons of England, and the Kents and Marshalls of America. His name needs not our panegyric. The carver of his own fortune; the founder of his own name; with his own hand he has built his own monument, and with his own tongue and his own pen he has stereotyped his own autobiography. With hopeful trust, his maternal Commonwealth consigns his fame to the justice of history and to the considerate judgment of ages to come.

REVERDY JOHNSON.

REVERDY JOHNSON

From a photograph reproduced by Bernard C. Steiner of Baltimore.



REVERDY JOHNSON.

1796-1876.

BY

BERNARD CHRISTIAN STEINER,

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IN the field of national politics during the period of the American Civil War two members of the Baltimore bar gained far-reaching reputation: the one, Henry Winter Davis, was the greater orator; the other, Reverdy Johnson, the greater lawyer. The eminence of the latter in the legal profession was so great that, for a number of years before his death, he was known as the leader of the bar of the Supreme Court of the United States and, through his achievements in that court and in the courts of the State of Maryland, he clearly won the right to be counted among the greatest of the many great men who have shed luster upon the Maryland bar.

Reverdy Johnson was born at Annapolis on May 21st, 1796, and was the son of John Johnson and of Deborah, a daughter of Reverdy Ghieselen. His maternal grandfather, of a Huguenot family, had been commissioner of the Land Office of Maryland and was associated with the Reverend Thomas Bacon

in the preparation of his monumental compilation of the Laws of Maryland. John Johnson was a lawyer, who served the state as member of both houses of the Legislature, as attorney-general, as judge of the Court of Appeals, and as chancellor. One of his sons, John Johnson, Jr., was also a lawyer, who served the state as chancellor. With such relatives, Reverdy Johnson, growing up at the Capital of Maryland, naturally turned his thoughts toward the law as his life work. He was educated at St. John's, the local college, until he was sixteen, and then began reading law with his father. He completed his studies in the office of Judge Stephen and was admitted to the bar at the age of twenty, in 1816. During the British alarms of 1814, he served for a time as a private in the 22d regiment of Maryland militia.

On his admission to the practice of the law, he settled at Upper Marlborough, the county seat of Prince George's County. The story is told that he was so discouraged by his first speech that he would have abandoned the law, but for the cheer given him by Judge Edmund Key of Prince George's County. However, he soon showed such signs of ability that he was appointed by the Attorney-General his Deputy for the judicial district. Johnson soon sought a wider field and removed, in November, 1817, to Baltimore, at the bar of which city he continued in active practice until his death. Shortly after his removal to Baltimore, on November 16th, 1819, Johnson mar-

ried Mary Mackall Bowie, who bore him fifteen children and with whom he lived happily for over forty years. She was the daughter of Thomas Contee and Mary Mackall Bowie and the granddaughter of Governor Robert Bowie. Johnson's career soon proved one of great brilliancy and success, through the vigor of his intellect and the determination of his character. His quickness of mind, his unbroken cheerfulness, his power of repartee, his uniform courtesy and urbanity, his cogent and resistless arguments, the lucid and logical arrangement of his discourse to court or to jury, all these united to make him a powerful advocate and give him a great reputation as a *nisi prius* lawyer. His skill in the cross-examination of witnesses was so great that "his contemporaries agreed that, in this line, he stood absolutely without an equal."

The Honorable J. Upshur Dennis of Baltimore said, in some personal recollections of Johnson read before the Maryland State Bar Association in 1905:

It was a treat to see him fence with a bright but hostile witness — how he would joke with him and provoke repartee, out of which Mr. Johnson was pretty sure to get something on his own side of the case before he got through, either from the witness himself, or by his own replies intended for the jury; for of the jury he never lost sight, from the time the case was called, until the verdict was announced. No answer of the witness, no matter how unexpected, ever seemed to disconcert him; he acted as if it was the very thing he was looking for and would make some suggestion or give some interpretation, which would make it seem that the answer was really in his favor.

Judge Dennis is not alone in believing that "his greatest forte was as a *nisi prius* lawyer" and that he was best suited for the work of the trial table. Speaking of Johnson, he says:

He was especially well fitted, by his imposing appearance, his manners, and a certain original way of saying and doing things which from others would have fallen flat but from him always counted. He spoke slowly, in a full strong voice, deliberately, and even at the climax of his argument, was seldom over-loud, or at all passionate — only more grave and dignified and with more pronounced emphasis. He was the very embodiment of good nature, as I knew him at the trial table and elsewhere — full of humor, fond of fun, even jocose when the occasion permitted. While he was not witty, in the strict sense of the word, yet he was fond of repartee and seldom came off second-best. The sharpest shafts of his opponent's wit or sarcasm evoked his laughter and apparent enjoyment of the thrust, even at his own expense, as heartily as that of any of the audience, while he was sure to come back with some blunt broadly humorous retort that rarely failed to turn the laugh upon his adversary.

With such equipment and with a remarkable memory, Johnson soon made his way among the eminent men at the Baltimore bar and Robert Goodloe Harper said, "There is that young man, Reverdy Johnson, sir, he is very clever. He may lead them all yet." He was soon appointed chief commissioner of insolvent debtors and his experience in this post was destined to be valuable to him in years to come, when he had a part in the framing of the national bankruptcy act. Johnson's entry into the political world came, when he was elected on December 10th,

1821, by the Senate of Maryland a member of that body to fill the vacancy caused because General John Stricker declined an election. The Senate, at that time, was composed of fifteen members who were elected for a term of five years by an electoral college chosen by the voters and who filled vacancies in their ranks for the remainder of the term. The Republican party had secured a majority in the electoral college of 1821 and had elected a Senate composed entirely from the members of their own party, with which party Johnson was affiliated in early life. He served throughout the term and was reelected in 1826, but resigned on March 8th, 1828, owing to the pressure of his professional engagements. His desire to improve the administration of the law led him to introduce a bill to enable parties to a law suit to testify, though he was not able to push it to passage. He also aided in the accomplishment of certain measures of internal improvement. His practice had grown rapidly. In 1827 he pleaded his first case in the United States Supreme Court, the important one of *Brown vs. Maryland*, in which he was one of the lawyers for the state and, about the same time, he became one of the first counsel for the newly chartered Baltimore and Ohio railroad, of which corporation he was one of the legal advisers for nearly a half century. Through his advocacy of a broad construction of the Federal Constitution, he became a member of the Whig party at its organization, but he remained out of political life

for seventeen years from the time of his resignation of his position in the state Senate. During these years, he was extremely successful in legal practice. In 1831, fifteen years after he had been admitted to the bar and when thirty-five years of age, he had an income of nearly \$11,000 and for each of several years thereafter made an average of the same amount. He began "a long and intimate acquaintance" with Taney, which ended only with the death of the Chief-Justice, and with other leaders of the bar had such friendly relations as with McMahon, the historian and author of the charter of the Baltimore & Ohio Railroad, who wrote him in 1835, that, "I have always found you a man in whose abilities and integrity I could repose full confidence; that I have never had occasion to falter in that admiration of your talents and character, which has grown up from a long and intimate acquaintance; and that, whatever others may say, I claim, what I hope I shall long enjoy, the privilege of calling you my friend." Among his associates was one who was prominent in local banking circles, who induced him in 1832 to become a director of the Bank of Maryland, of which this associate was president, and later Johnson became one of the organizers of an insurance company in which the same persons were interested as in the bank. Engrossed in legal matters, Johnson paid little attention to the affairs of the bank and cannot be acquitted of the charge of serving as a dummy director. In March, 1834, the bank failed

and its funds were shown to have been used for speculative purposes. Three trustees were appointed and McMahon and Johnson were named as their counsel. The trustees fell out, two of them disagreeing with the third. Ugly charges of fraud were made on both sides and a war of pamphlets followed between the former president of the bank and the majority of the trustees. Considerable delay occurred and a great deal of litigation prevented the depositors from receiving any part of their claims. A suit brought by the bank's trustees against a person associated with the former president was removed to Belair and tried there in May and June, 1835. An array of able counsel was engaged on both sides and considerable latitude was allowed in the reception of evidence, with the result that Johnson was conclusively cleared from any wrongdoing in connection with the bank. Johnson's own argument in summing up was said by a fellow attorney to have scoured the defendant "naked for three days, until even his adversaries were moved to compassionate him."

In Baltimore, however, a number of people were brought to believe that Johnson and the trustees were responsible for the failure to settle the bank's affairs promptly and on the evening of August 7th, while Johnson was with his family at Annapolis, whither he had gone on professional business, a mob gathered and broke some of the windows of the house. The mayor, who had been a director of the broken bank, was inefficient. On Friday, the 8th, more damage

was done, after a meeting of creditors had demanded that the trustees turn over the bank's books to them. On Saturday, anonymous, inflammatory placards were scattered throughout the city and on that night a number of citizens, called together by the mayor, some armed with round sticks and so called the "rolling pin guards" and others with muskets, met the mob; but the weakness of the city authorities finally left the mob in control and, on that night and Sunday, the houses of Johnson and the trustees were plundered and destroyed. On Monday morning, the veteran General Samuel Smith was induced to place himself at the head of the citizens who wished order restored, the mayor resigned, and the mob was dispersed. Johnson went from Annapolis to Belair, whence he and his associates were invited shortly to return to Baltimore and promised the protection of one of the volunteer companies. He came back, rebuilt his house, bought William Wirt's law library of four or five thousand volumes to take the place of the one he had lost, and, on petition to the General Assembly, was allowed nearly \$41,000 indemnity, on the ground that his loss had occurred through failure of the civil authorities to protect his property.

Johnson's busy professional career was seriously affected by an accident which occurred in 1842. One of his friends had challenged a man who had struck him to fight a duel, and the challenger had come to Johnson's house to elude the officer who had a warrant of arrest against him. Whilst his friend was

his guest, Johnson practiced with a duelling pistol, a bullet from which rebounded from the hickory sapling at which he aimed it and struck his left eye, so injuring it that he lost the sight of it. In the course of time, the other eye failed through sympathetic action and he became nearly blind. Judge Dennis says, "He could not walk the streets or even a room with furniture in it, without the guiding assistance of some one, and was not able to recognize features at all," but he gained a remarkable skill at distinguishing voices and delighted to show friends to the last that he could find on the shelves of his library any book he wished from the lettering on the back. Great as was his calamity, he was undaunted by it, had the newspapers read to him for important events and, as he had been always courteous to others, found a return of that courtesy in the eagerness with which his juniors at the trial table gladly found his references in the books. His blindness was the less of a misfortune for him, in that he was not in the habit of citing many authorities. Never a bookish lawyer, he devoted himself rather to evolving rules applicable to the particular case from the fundamental principles of the law. His limitations of sight prevented him from being a profound student of reports or text books in general; but he knew the *Federalist*, and the *Commentaries* of Kent and Story on the Constitution, as well as the reports of the United States Supreme Court, so thoroughly that he had a wonderful fluency of reference to them and his remembrance of events

in American history was so extensive that his power as a constitutional lawyer was scarcely affected. "He was a thorough master of the underlying principles," says Judge Dennis, "and his powerful intellect and extraordinary gift of common sense built upon these foundation stones a structure that was difficult for any attack to shatter." For example, the case of Bayne vs. the National Banks, in the United States Circuit Court in Baltimore, before Chief-Judge Chase and District Judge Giles, involved a very large amount of money and the correct interpretation of the national banking law. Against Johnson was Judge Benjamin R. Curtis of Boston, Johnson's great rival at the bar, yet in the speech he made then, which still seemed to Judge Dennis many years afterwards, "the greatest law argument" he ever heard, he referred to only one authority "and few that heard him, after he had argued out his case on principle, thought that he needed the support of even that one citation." Not only did he cite very few authorities; but he was equally sparing of quotations and allusions to persons and events in literature or history outside of the national history of the United States. In all his speeches, I have come across hardly half a dozen quotations and these singularly enough are all of verses of poetry of very little merit. Unfriendly critics commented on this lack of display of literary attainment and said they would not go to court to hear him speak, as they "had no desire to hear a man whose vocabulary consisted of 600 words;" but when men

went to hear him, they listened to forceful, well chosen, and powerful use of a vocabulary adequate to carry conviction of the cause argued. He had a little trick of repeating the noun with each of several adjectives by which he wished to modify it and certain words of Latin origin were favorites with him, as, for example, he said *termination* instead of *end*. But there were few tricks or mannerisms in his straightforward and direct discourse. He never bore malice and when an altercation in the Criminal Court, in which he often practiced, led to a challenge to a duel between him and another attorney, a prompt arrest of Johnson by warrant and a day or two's reflection led him to shake hands with his antagonist in open court and to a complete reconciliation, which lasted until death.

The most complete description which I have found of his personal appearance is contained in Judge Dennis's reminiscences:

He was of medium height, round bodied, solidly almost sturdily built, just such a physical mould as indicated perfect health, capacity for work, and endurance, without the risk of a breakdown, of all the toils and strains of the most active life at the trial table. He was cursed with neither nerves nor liver, but was the robust embodiment of *mens sana in corpore sano*. His features were strong; his forehead of great height, fullness, and breadth; while the back of his head was shaped like a barrel and seemed to bulge out all around, as if indicating holding capacity. But the dome of his head was its most striking feature—so lofty, so symmetrically rounded, that it seemed to tower above all others, as the dome of St. Peter's minimizes all other designs.

In the early forties, Johnson visited Europe and spent some time in London. In the campaign for the Presidency of the United States in 1844, he took an active part, serving as delegate to the Whig nominating convention in Baltimore and presenting the report of the committee on the platform, as well as addressing, with Webster and other leaders, a vast concourse at a popular ratification meeting. A few months thereafter, the Maryland legislature elected him to the United States Senate, where James Alfred Pearce presented his credentials and where he was sworn in on March 4th, 1845. His first activity in that body occurred in the session beginning in December of that year and he quickly showed himself the peer of such great men as Clay and Calhoun. With the latter, Johnson resided in the same house for two sessions and, receiving much of Calhoun's confidence, frequently heard him in private argument, with "wonderful acuteness," defend nullification on constitutional grounds and distinguish it from secession, which both statesmen placed on no "other ground than that of revolution." Johnson's first important speech was upon the Oregon question and was made on March 11th, 1846. In it, his eloquence was directed to an attack upon the administration, but two months later, Johnson broke from his party, declared that he believed a state of war existed between Mexico and the United States, and that the territory of the United States had been invaded. He would have voted against the annexation of Texas,

but did not think that his country was the aggressor in the war. He uttered these views not only on the floor of the Senate, but also in a public meeting in Baltimore. He showed his loose construction views by advocating action in emergencies, when the constitution was silent, and by opposing the lowering of protective duties in the tariff of 1846. In carrying on the war, he urged active measures, decried the use of militia as the "least efficient, the most dangerous, and expensive course," insisted on increasing taxation, and was emphatic in his attacks upon the administration for inefficiency in its military policy and for its "revolting" project of terminating the war by dismembering a sister republic. The war was not begun to annex territory and his astute mind foresaw that the questions "likely to arise on the admission of any new territory" might "cause the Union to totter to its very foundations." He also opposed, on constitutional grounds, "any clause prohibiting slavery in territory which may be acquired," as the states are equal in all respects and, consequently, the citizens of slave states should not be prohibited by Congress from settling with their slaves in acquired territory. He was not a pro-slavery man, however, but said I "have ever believed, since I was capable of thought," that slavery "is a great affliction to any country where it prevails" and, so believing, he had early emancipated the slaves whom he had inherited from his father. He doubted the value of slave labor anywhere and was convinced

that, for Maryland, it was "the very dearest species of labor." Slave labor admitted of no comparison with the labor of freemen, and the institution of slavery was one "sooner or later pregnant with fearful peril." Yet Johnson showed the nervous sensitiveness on the negro question always displayed in the South, attributed much of the strength of slavery to the efforts of political abolitionists in the North, and insisted that the North must leave the question to be settled by southern men. As months went on, Johnson found the differences between him and the Democratic party on all questions but the war "more and more strengthened and confirmed. I believe they misapprehend the true policy of the country and fundamentally err upon great and vital points of constitutional power."

It is interesting to observe that he spoke of the doctrine that the spoils of office belong to the victor as "bred in the corruption of the motto of the political freebooter;" that he said he felt no alarm at the growing power of the president, but felt that both power of appointment and of veto must be in his hands to ensure the safety of the country. These views too he held, when he was attacking what he felt to be the quasi usurpation of a president opposed to his party. In a speech delivered in 1848, he eulogized the Supreme Court, particularly Judge Taney, denounced election of judges by the people and showed his love for the nation by saying: "Loss of freedom is alone to be compared to the loss of the

Union. Nor indeed can freedom be lost, if the Union is in good faith preserved."

When Zachary Taylor was elected president by the Whigs in 1848, a bill was pending for the establishment of the Department of the Interior and certain senators were induced to vote for it and thus secure its passage upon representations made them that, if a new secretaryship were created, Taylor would be able to find a place among his heads of departments for Reverdy Johnson, for whom they had a deep admiration. As a result of this, on March 9th, 1849, Johnson resigned his senatorial seat to become Attorney-General of the United States and held that post until Taylor's death in the summer of 1850. His opinions are of little interest. In general, he believed in following the doctrine of *Stare decisis* with reference to the opinions of his predecessors, though he decided differently from them when he saw good cause so to do. His most interesting decision, especially in view of his later diplomatic career, is one against allowing the purchase and fitting out in New York of a steamer by the German government, as an act contrary to the neutrality law, inasmuch as the ulterior purpose of Germany was to use the vessel in the war against Denmark. In many respects, Johnson was admirably adapted to be attorney-general and it may be regretted that he had not greater opportunity to distinguish himself in that office. Judge Dennis rightly says his highest fame will always rest "upon his achievements as a consti-

tutional lawyer." Early he constructed for himself a system of constitutional interpretation, to which he held with marvelous consistency through the shifting scenes of his life and so wide was the extent of his exposition of the Federal Constitution that it would be possible to construct almost a complete commentary upon that great document from his published speeches and addresses.

After retiring from the attorney-generalship, Johnson returned to the active practice of the law and, for ten years, but fleeting glimpses are caught of him. In 1854, he was employed, together with Lord Cairns, as counsel in London to argue a claim before the joint English and American commission established under the treaty of 1853 and, while there he received much attention from public men and from members of the English bar. Shortly after his return, he became one of the counsel for the defense in the great Dred Scott case before the Federal Supreme Court. In this case, Johnson illustrated a conspicuous characteristic, he entered the case without any fee, as indeed did the other council upon both sides. This was not an isolated instance of Johnson's serving without remuneration. Although he was said to receive the largest fees of any member of the American bar, when either his sense of justice or the presence of some nice constitutional or legal point was noticed in the case, he frequently volunteered his services and kept up this generous practice until the last days of his life. The case was heard twice

and Senator Geyer of Missouri, a native of Maryland, was with Johnson at both hearings. Against them was Montgomery Blair, with whom George Ticknor Curtis was joined in the second hearing. Years later, when Johnson was dead, Curtis said: "It was his forcible presentation of the southern view of our Constitution, in respect to the relations of slavery to the territories and of the territories to the Nation that contributed more than anything else to bring about the decision that was made" in the case. "I believe that he held those opinions with entire sincerity; at any rate he enforced them with great power. Those who were opposed to him (and I happened to be one of them) felt the force of his arguments and foresaw what their effect would be on a majority of the Court."

In his defense of the Court and particularly of Chief-Justice Taney for this decision, Johnson was always most emphatic and the only time in his senatorial service during the Civil War Period, when he lost control of himself and made a bitter personal attack upon his antagonists was in defense of his friend the Chief-Justice, to whom after his death it was proposed to vote a bust. In 1854, at the break up of the Whig party, Johnson affiliated himself with the Democratic party and in 1856, he is said to have made an eloquent address in favor of the election of Buchanan to the presidency.

He possessed a marvelous power of making and keeping friends on both political camps, and, when

Brooks assaulted Charles Sumner, sent promptly a message of "kindest remembrance" to the latter, asking as to his condition, and expressing "the highest regard for him as a friend, though differing with him on the exciting question of the day." In the Democratic party, he was never fully at home and, after the close of the Civil War, he said "I never really was a Democrat;" but while he was in the ranks of that party, he followed Douglas and was an advocate of popular or squatter sovereignty. These views he developed in a pamphlet which he wrote in 1859. He denied that the Supreme Court had touched upon the matter at all in the Dred Scott decision and with great force and acumen pressed his point that the decision had merely denied the right of Congress to restrict slavery in the territories of the United States. The question as to the right of territorial inhabitants to regulate or restrict it, had not been touched and as laws concerning slavery were different in the several slave states, there must be some authority within the territory to frame local regulations, or a hopeless confusion would result.

In the turbulent local politics of Baltimore, Johnson took his part. He joined a committee of citizens to urge the governor not to call out the military forces on election day in 1857. In 1860 the law providing that the police force of the city should be taken away from the hands of the local authorities and placed under commissioners appointed by the state government came before the Court of Appeals.

Mr. Johnson, with other eminent attorneys, defended the law. In their argument and in the opinion of the Court the whole relation of municipalities to the state was elaborately set forth. Of other important cases before the courts, we catch glimpses and find him defending a Naval officer before a court of inquiry, arguing a case at Cincinnati before Judge McLean, with Stanton and Lincoln also at the trial table, winning an important case in reference to Arkansas swamp lands, and gaining great familiarity with government land grants in the northwest and in California.

Though he became a communicant church member late in life, Johnson was a deeply religious man and, in a trip to San Francisco in the autumn of 1860, he was induced to deliver an address at the dedication of a church upon the "Influence of Christianity on the Individual and Social Condition of Man." This address was printed and shows a profound confidence in the truth of the Scriptures, the power of Christ's life, and the complete triumph of Christianity in the future.

In the presidential campaign of 1860, Johnson naturally supported the candidacy of Douglas and, in his behalf, delivered a stirring address in Faneuil Hall on May 22d, 1860, in which he said that the Democratic party was now the only national one. After Lincoln's election and the secession of South Carolina, Johnson, without a moment's hesitation, took his place among the foremost advocates of union

and opponents of secession. This position he never left. At the close of the war, he stated that he never had referred to the Confederates but as traitors, rebels, or insurrectionists and no man could have been fiercer than he in his denunciation of that "mischievous heresy of secession." In December, 1860, in concluding his argument in an important case in the Supreme Court, he said: "This may be the last time this court will sit in peaceful judgment on the constitution as acknowledged and obeyed by all." He hoped heaven would avert this calamity but, if it should come, felt that the record of the court was secure. On January 10th, 1861, a meeting of the friends of the Union was held in the hall of the Maryland Institute, on which occasion Johnson delivered the principal address, a long and eloquent oration, breathing the spirit of fervent loyalty to the Union. The argument made here was expressed by him on other occasions in different forms, but the substance ever remained the same. After discussing the history of our union of states, first under the Confederation, a league of states, lacking means to enforce what powers were committed to it, even more than lacking adequacy in the grant of powers, and then under the Constitution, in which he found a grant of sufficient powers and means to enforce them, he said that under the power to repress insurrection the President may prevent secession. "The offending citizen cannot rely as a defense on state power. His responsibility is to the United States alone. His

allegiance, his paramount allegiance, out of which the responsibility springs as to all these powers, is to that government alone. His state cannot legally protect him, or stand in his place. Her prior sovereignty as to this was extinguished by the act of the people in adopting the constitution never again to be resumed under that instrument." The Constitution is not "fatally impotent," through lack of coercive power. "It is true it contains no power to declare war against a state, but it has every power for the execution of the laws and the enforcement of their penalties. It goes against the individual offender. It makes no appeal to the state power to protect it. For that end, it is self-sustaining." The Federal government does not coerce the state but the state's citizens and whether one or all of them must be punished, it makes no difference in the legal position of the national authorities. In his glowing peroration, he urged the reënforcement and defense of Fort Sumter at all hazards and advocated amendments to the Constitution, safeguarding the South against attacks of Northern abolitionists who he thought had been much to blame for arousing bitterness of feeling.

Shortly after this meeting, Johnson was appointed by Governor Hicks as one of five delegates from Maryland to the Peace Congress held at Washington, served in that Congress on a committee of one from each state to report what they "deem right, necessary, and proper to restore harmony and pre-

serve the union," and advocated earnestly the amendments proposed to the Federal Constitution as a ground for compromise. Johnson had always favored moderate measures and had opposed the hanging of John Brown. The day for compromise, however, was past, Fort Sumter fell and the Sixth Massachusetts regiment fought the mob in the Baltimore streets. With a delegation of prominent Baltimoreans, Johnson came to Lincoln to learn if he meditated invasion of the south and though the contents of Lincoln's confidential answer, that he merely intended to protect the capital, through Johnson's incautiousness, were speedily transmitted to the Confederates, relations of cordial support of Lincoln by Johnson were established for the time. This led Lincoln to request Johnson to answer Taney's opinion in *Ex parte Merryman*, as to the right of the President to suspend the writ of *habeas corpus*. Johnson for once differed with Taney and published a reply to him, in which, with great perspicacity, the constitutionality of Lincoln's act is defended. The power is essentially a military one and "under the Constitution of the United States it is clear that, although the power to declare war is vested solely in Congress, the conduct of the war is solely with the President." Johnson always laid emphasis upon the fact that, though the Congressional Powers are enumerated in the Constitution, the Executive power, which is vested in the president, is nowhere limited and so, by fair implication, may be considered to

cover the means necessary, faithfully, to carry out the laws. If the president may not suspend the writ, he is made subordinate, not only to the Supreme Court and to all of its justices, but also to every civil functionary of Federal or State government, who has the right to issue the writ of habeas corpus and the power of the president to suppress insurrection would be rendered ineffective. On May 7th, 1861, Johnson addressed the Brengle home guard of Frederick, on the occasion of the presentation to them of a flag by a number of ladies of that town. In this speech, he apologizes for the recent tumults in Baltimore, insists that in "every true Maryland bosom there is a devoted attachment to the national emblem" and asserts that "to the Union we are not only bound by gratitude to the noble ancestry, by whose patriotic wisdom it was bequeathed to us, and by the unappreciable blessings the bequest has conferred upon us, but by the assurance, which the most stolid intellect can hardly fail to feel, that its destruction would not only and at once deprive us of all these, but precipitate us into irretrievable ruin. In this ruin, all would more or less participate, but our geographical position would make it to us immediate and total."

Though Johnson insisted on the guilt of the secessionists and asserted that a conspiracy of designing leaders had deceived the people of the south, when it came to a question of the cases of individuals, he ceaselessly exerted himself to free from imprison-

ment suspected persons, especially those living in Maryland, using his efforts sometimes with and sometimes without pay. Benjamin F. Butler, who commanded in Maryland during a part of 1861, never forgave him for this and it affords a curious glimpse of contemporary moral standards when we read that Johnson publicly justified on the floor of the senate his own practice of taking fees, after he became a senator, to induce the federal government to free his clients suspected of disloyalty. During the war, he also appeared as counsel for army officers, who were tried by court-martial, General Fitz John Porter being his best known client. Johnson's kindness of heart was shown in a letter he wrote Judah P. Benjamin in September, 1861, in which he asked him to send a full brief in a case in which both great lawyers were engaged in the Supreme Court, Johnson saying that he will then try to get Benjamin his fee.

In the autumn of 1861, the Union men of Baltimore County nominated Johnson as a candidate for the House of Delegates and he was elected as a part of the Union majority of the Legislature, after an exciting campaign, in which he made only one speech, but that a noteworthy one at Calverton on November 4th. In this speech, he vehemently attacked the secessionists in Maryland and in the south and said that the federal government was right to use force, not to subjugate the south, but to " vindicate the Constitution and laws and maintain the existence of

the government," to "suppress the insurrection, force the citizen to return to his duty, and restore him to the unequaled benefits of the Union." The House of Delegates in which Johnson served was one of marked ability, containing such men as John A. J. Croswell, Thomas S. Alexander, Thomas King Carroll, R. Stockett Matthews, J. V. L. Findlay and John S. Berry. In it Johnson introduced his favorite bill allowing parties to testify in cases before the courts and submitted vigorous resolves "on the subject of the course the state will pursue in the present rebellion," in which an indignant denial is made of the statement that Maryland is really with the south, and an ardent loyalty is professed to the federal government. On March 5th, 1862, the legislature elected Johnson to the United States senate by a vote of fifty-six to twenty-eight. In the caucus the contest had been a spirited and very close one, between Johnson and William Price of western Maryland, who represented the moderate men, and Henry Winter Davis, who represented the more radical element. When Thomas S. Alexander, the great chancery lawyer, heard of the nomination, he said, "Slavery has received the worst blow that it has ever yet met." Johnson's senatorial service, the greatest and most essential he rendered his country, did not begin until December, 1863, though his colleague, Governor Hicks, presented his credentials in February. In the interim between his election and his taking his seat, he was sent to New Orleans by Lincoln in June,

1862, as a special agent of the State Department "to investigate and report upon the complaints made by foreign consuls against the late military proceedings." General Butler had seized at New Orleans certain property of the consuls and of other foreign subjects and there was considerable complaint concerning the legality of these seizures. Johnson arrived in New Orleans early in July and, after a careful investigation of the matter, ordered a great part of the seized property to be restored. Butler also conferred with Johnson, with reference to the shipment of cotton, but was so disgusted with the position of the commissioners-general that he wrote Secretary Seward "another such commissioner as Mr. Johnson sent to New Orleans would render the city untenable." At New Orleans, Johnson speedily showed his distaste for military rule and, in response to a letter written Lincoln within a week of his arrival in Louisiana, in which Johnson expressed the fear that General Phelps was crushing union feeling in the state, Lincoln wrote:

You remember telling me the day after the Baltimore mob in April, 1861, that it would crush all union feeling in Maryland for me to attempt bringing troops over Maryland soil to Washington. I brought the troops notwithstanding and yet there was Union feeling enough left to elect a legislature the next autumn, which in turn elected a very excellent Union United States Senator. I am a patient man, always willing to forgive on the Christian terms of repentance and also to give ample time for repentance, still I must save this government if possible. What I cannot do, of course I will not do, but it may as well be understood,

once for all, that I shall not surrender this game, leaving any available card unplayed.

On Johnson's return to congress, he took a position at once at the head of the Conservative Union men, and advocated the prosecution of the war and the restoration theory of reconstruction. He was easily the equal of any man on the floor of the senate on constitutional questions and the superior of most of them, and constitutional questions were to occupy the time of the body during most of Johnson's term. In repartee, he was quick, his memory was so sure that he could easily refute careless statements; his acuteness was so great that he saw the real point at issue and aimed directly at it or, if he thought that he might throw his antagonists off the true scent, "wandered" into a discussion of themes more or less closely related. His relations to all the members were friendly and in debate he was the soul of courtesy. However emphatic his words might be in characterizing the policy of his opponents on the hustings, in the senate his urbanity was almost always imperturbed. How much the country owes to his conciliatory disposition during those eventful years can scarcely be measured. He was no extremist and was even willing to sink his own views as to expediency, or even as to the constitutionality of measures; if thereby he could lead the majority to some greatly desired end. His conduct was that of a statesman, not of a politician, and at times, though he opposed a bill, he would suggest amendments to

it, so as to render it less objectionable. With Sumner, his conflicts were almost daily and, on constitutional points, he invariably worsted him, while he was constantly parrying Sumner's thrusts and driving counter ones home. With Fessenden he sparred on terms of full equality and that too much neglected great man, Lyman Trumbull of Illinois, was the only senator, who, in my judgment, ever came out victor in a conflict with Johnson. Soon after he came into the senate, Johnson broke with Lincoln and, in the presidential campaign of 1864, he supported McClellan with zeal. In his behalf, he delivered a stirring address in Brooklyn in October, 1864, in which, while professing as much abhorrence as ever for the claim of the right to secede, he stated that Lincoln's war policy had been a failure and, though the present war had given slavery a death blow, there was no right in Lincoln's demand that slavery be abolished in the south as a condition of peace.

In the same year, a Constitutional Convention was held in Maryland and a constitution which abolished slavery was submitted to the people for ratification. The Convention prescribed an oath of loyalty to be taken by all voters and Johnson gave an opinion that this requirement was unconstitutional, but that there was no remedy for it and that people who can do so may take the oath and vote upon the Constitution. In the Senate, December, 1863, Johnson had objected to a similar oath as prescribed for officers of the

United States and, in the debate on that oath, he developed an elaborate argument in defense of the position that Members of Congress are not officers.

We can but summarize his position on the many important questions which came up. He favored the voluntary enlistment of negroes, and opposed that of Indians, and expressed the wish that enough white men might have been found as troops to have ended the war. Slaves as "persons" could be legally enlisted, but their master should be paid for them. They did not become free at enlistment, but should be freed, with compensation to loyal masters, because of enlistment. The families of slaves, however, should not be liberated by the slave's enlistment; partly because this would be unjust to masters, partly because it interfered with states' rights, and partly because the demoralization caused by slavery had made it impossible to find the families in many cases. He insisted upon Maryland's loyalty and was quick to protest against any high-handed acts of the Federal government in that state. He denied that the rebellion was to be put down under the war power which referred to foreign relations, but under that to suppress insurrection. It was true that under the great extent of the insurrection it had become necessary to concede privileges of belligerency to the Confederates and it was questionable whether this concession did not take away the right to punish them for high treason, to the penalties of which crime they would otherwise have been liable.

When the insurrection is put down, the power to suppress it is at an end. The states have never been out of the Union and consequently need not to be brought back. At the conclusion of a civil war, amnesty should be given as soon as possible, the states should be encouraged to reëstablish their governments, on the basis of present not past loyalty to the United States, and representatives should be chosen to Congress, to be accepted or rejected according to their individual qualifications and not because they come from states whose citizens have lately been in rebellion. If the South is willing to return, the mass of the people must be pardoned, for if all are punished, no inhabitants would be left but the former slaves. Though he thought the war should be ended, when the South was willing to submit, he was willing to destroy slavery by constitutional change. He voted for the 13th Amendment, and said "I thank God, as a compensation for the blood, the treasure and agony which have been brought into our households," the war "has stricken now and forever this institution from its place among our States."

After Lincoln's assassination, Johnson, who had served as one of the pallbearers on the part of the Senate, appeared without compensation as one of the counsel for Mrs. Surratt, who was tried by military commission for complicity in the murder of the President. His chief part in the case, however, was to prepare a written argument which was read by his

associate "to establish the illegality of military commissions in the United States" and especially of this commission. He did not seek immunity for any one guilty of the "horrid crimes," but claimed that the trial should proceed before the civil courts. Following out the same line of argument, Johnson appeared before the Supreme Court in *Ex parte* Milligan and there won his case. He also acted, without any fee, as counsel, together with Matthew Carpenter and A. H. Garland, at the request of the latter, in *Ex parte* Garland, in which case the *ex post facto* oath was declared unconstitutional. Garland had been admitted to the Supreme Court on Johnson's motion in 1860 and apart from the constitutional side of the question, Johnson's interest in younger lawyers, which was shown to many, was a reason for his taking part in the case. About the same time, Johnson, with Montgomery Blair and David Dudley Field, was successful in the Supreme Court in defending one Cummings, a Roman Catholic priest who preached in Missouri without taking the iron clad oath.

In the great 39th Congress, Johnson's career was most conspicuous. Sitting to the right of the Vice-President's chair and in the row of seats nearest his desk, where Johnson was one of the most conspicuous figures in the house, he showed that his mind had lost none of its force and power, though he was now about seventy years of age. He was the oldest member of the body, in years if not in service, and his con-

ciliatory disposition and friendly relations with all the members did much to increase the efficiency of his leadership of the minority. On reconstruction, his policy consistently favored restoration of the southern states with amnesty to their citizens. He cited the proceedings of all departments of government during the war and of the judicial and executive departments later, as proving that the states were not out of the union. The citizens' disloyalty could not put the states out and the moment that resistance was abandoned, the authority of the United States was reinstated. When the 14th Amendment was presented, Johnson opposed it, although he favored certain provisions in it—as he thought there ought to be a constitutional definition of citizenship in the United States, and believed that negroes would be citizens but for the decision in the Dred Scott case. He held that the phrase "All men are created equal," included negroes, but held that only a juristic equality was meant and that political and social equality should be excluded. He believed in the possibilities of the negro, but opposed granting him the suffrage at the present, or the deprivation of representation from the southern states, on the ground that negroes did not vote there. He believed they should be counted in for representative purposes, as women are. Suffrage, he thought, is not an inalienable right, but a privilege which government may grant or withhold. Leave the black man without suffrage "until he can raise himself to

the elevation of the white race, as I think he may, and then, if possible, change your organic law."

Johnson favored Andrew Johnson's presidential plan of reconstruction but was not closely connected with the President, nor a blind follower of his. He was the only representative of the minority in the Senate in the Committee of fifteen on reconstruction and, as the leader of the minority in the senate, had to defend a number of the President's vetoes. The power of removal by the President was vigorously upheld by Johnson and he especially emphasized the folly of requiring the President to keep in office, as the heads of departments, men who no longer had his confidence.

He was so busy with practice in these days that he would leave the senate, argue a case in the Supreme Court and then return to his desk, while in the interval between sessions, he was occupied in the work of the law in the Maryland and Pennsylvania courts. In the summer of 1866, a convention of conservative unionists was held in Philadelphia and an address then prepared was presented by Johnson to the President on August 18th. In November 3d, he delivered a speech at Towson, in which he took strong ground for speedy readmission of the states, now that the "insane attempt to dissolve" the union had failed, and for the repeal of the iron clad oath in Maryland, yet so conservative was he, that he discouraged the calling of a constitutional convention in the state during the following year, after the Dem-

ocrats gained control of the state government, lest the convention cause too much disturbance.

In the winter of 1866 and 1867, men saw Johnson taking a notable stand. On the one hand, he showed the Senate, by masterly argument, that the president's power to pardon was constitutional and could not be taken from him; opposed "making a cipher of any department of government," and insisted that the clause in the constitution guaranteeing a republican form of government to each of the states had no possible reference to negro suffrage, but meant a government "which corresponds with the governments in existence when the constitution was adopted." On the other hand, without consulting his political friends, he introduced an amendment to the Reconstruction act of 1867, providing that, when the southern states should have adopted negro suffrage, they should be readmitted to the Union, inasmuch as nothing can be worse than the present condition and some time should be set, at which the military dominion over these states should end and the country become one and indivisible. When this amendment was adopted, Johnson voted for the bill and did so again when Andrew Johnson vetoed it, as he believed that the states should be brought back, even with negro suffrage, and feared that, if this bill fail, the temper of the North, steadily growing sterner, would demand even harder terms. In March, at the extra session, he voted for the supplementary reconstruction bill and supported it over

Johnson's veto. But here he stopped and returned to the ranks of the minority. He had always believed the president would enforce the laws and, having received assurances to that effect from him, protested against the attempt to take the command of the army from him.

In May, 1867, he argued for the defendant in the case of Virginia vs. West Virginia, a boundary case in which he averred that the plaintiff was not a state and failed to win the assent of the Supreme Court in that contention. During that autumn, he published two pamphlets on the dangerous condition of the country, attacking the Congressional policy. But in spite of his difference in views, when Congress met in December, Johnson could say to Drake, a Republican Senator: "The relations between the honorable member and myself are such, and I am glad to say they are equally friendly with every member of the body, that he will never receive at my hands anything, but what will be most cheerfully rendered, the greatest courtesy."

Johnson stood firmly for peaceful relations between the United States and England. She had committed "gross errors" during the war and owed it to her honor to "pay every dollar of the losses which American citizens sustained in consequence of the cruise of the Alabama," but there could be no greater calamity than a war with England.

His first colleague from Maryland, Governor Hicks, had died in 1865 and Johnson pronounced a

fine eulogy over him. Creswell, a radical Union man, replaced him by gubernatorial appointment and afterwards the legislature elected Thomas, a Democrat, in the spring of 1867. Charges of disloyalty were made against him and, after long argument, in which Johnson took active part, he was not allowed to take the oath of office. The great impeachment trial of President Johnson took place in 1868 and Johnson took a prominent part in it. He was one of the committee on the rules of the court and to him largely was it due that the President was acquitted. He opposed in vain Wade's sitting in the court and filed an opinion stating that President Johnson was not guilty, which opinion was forceful and conclusive. He influenced several senators, who had been uncertain what course to pursue, by inducing them to rely upon President Johnson's integrity for the enforcement of the reconstruction acts. On the final vote, when Senator Grimes, one of the Republicans whom Johnson had induced to vote for acquittal, was ill and it was thought he could not be present, Johnson rose and said in reply to a statement that Grimes was absent: "The senator is here. I have sent for him. He is down stairs. He will be in the chamber in a moment. He is here." So he turned the result of one of the most dramatic moments in American history, for it will be remembered that conviction failed by one vote.

In the summer of 1868, Charles Francis Adams returned from England to the United States and the

President offered Johnson the vacant position of minister to Great Britain. The offer was accepted, a unanimous confirmation by the Senate followed, and, on July 9th, Johnson rose in the chamber and, overpowered by his feelings, asked Vickers, his colleague, to read his farewell address. He retired with the "deepest regret" and with a grateful remembrance of the kindnesses received from his fellow members. He went to London, "influenced by a sincere wish to secure to both governments an adjustment honorable to each." The *Congressional Globe* contains a remarkable note, stating that, at the close of the valedictory, the Senators rose, simultaneously, and grasped Johnson's hand to wish him success.

Johnson arrived in England in August, charged by Seward with the commissions to negotiate three treaties, viz.: recognizing our right to naturalize those who had been born British subjects; defining the boundary between Vancouver's Island and the United States, with special reference to San Juan Island; and arranging for an adjustment of the claims arising out of Great Britain's alleged failure rightly to assume the neutral position during the Civil War, the so-called Alabama claims. From his first arrival, Johnson received the warmest possible welcome. An English magazine said his appointment was "of the happiest augury for the friendship of the countries" and, quoted his statement that he came "hoping to be the envoy of peace and good will

and more, of friendship and cordial coöperation, in the progress of the race." It was said that his reception was "worthy of the distinguished statesman, high-souled gentleman, and the accomplished scholar that he is." He was banqueted in several cities and invited to the country seat of D'Israeli, the prime minister and, as soon as Lord Stanley returned from the Continent, Johnson met him on September 10th and wrote of the interview that he was "convinced there will be no serious difficulty." The negotiations went on rapidly, the protocol upon naturalization was signed on October 9th, and the three treaties were ready by November 7th, Johnson hastening them on, so as to have them ready for submission by the President when Congress met and to have them ratified before the presidential term should expire on March 4th. Seward objected to certain terms in the claims convention and, before these could be amended, a new government came in England, with Lord Clarendon as foreign minister. With him, Johnson took up the matter again in the middle of December and, on January 14th, was happy to be able to cable to the United States that the treaties had all been signed, containing exactly the conditions which Seward had directed. Sumner, chairman of the Senate's Committee on foreign relations, wrote on the 17th to John Bright:

All the treaties have been sent to the Senate in copy. They would have been ratified at any time last year almost unanimously. I fear that time will be needed to smooth the way now. Our

minister has advertised the questions by his numerous speeches, so that he has provoked the public attention if not opposition. . . . You are aware, of course, that the feeling toward Mr. Seward will not help the treaties.

In February, the committee on foreign relations of the senate voted unanimously to report the claims treaty unfavorably, but it was not even reported until after Grant was inaugurated. Then it was rejected, after Sumner had spoken in opposition to it on April 13th. Beside the fact that the treaty had been negotiated by an outgoing administration, the great objection to it was that it purported to be a convention to settle all mutual claims of citizens of the two countries since the conclusion of the treaty of 1853 and thus treated the public claims no differently from the private ones. After Johnson's death, the *New York Nation*, which had strongly opposed the treaty, admitted that: "Even his Alabama negotiations, now that the passions of the time are no longer active, must be acknowledged to have been creditable to him and it requires a good deal of discrimination to make out wherein the settlement obtained by him fell short of what was afterwards obtained by General Grant. The real objection to the treaty was that it was negotiated by a Johnsonian Democrat, who was too polite to the British aristocracy at a time when we hated the British aristocracy." Johnson returned from England early in June, 1869, and took up the practice of the law with such zest that his seventy-three years seemed to have brought no old

age to him. Judge Dennis writes of him that in these latter days "he seemed to me half the time to be trying a case for the fun of it," but that "in the general conduct of a case, his skill, his resourcefulness, his pertinacity, and a courage which no difficulties, or unforeseen adverse happenings could ever daunt made him an antagonist to be dreaded to the end." He was said to be "most dangerous," because "you never could be sure when you had him beaten." His very last case "was an ordinary damage suit for false arrest and imprisonment" which, like other *nisi prius* cases, "he took largely for the fun he got out of it." He continued to appear in important cases, such as concerning the fraudulent stock of the Parkersburg Branch Railroad, concerning the capitation tax on the Washington Branch Railroad, and concerning the North Carolina Special Tax bonds. In 1871, he published an able pamphlet on the Alabama claims, replying to a recent speech of Sir Roundell Palmer, the Earl of Selborne, in which he vigorously defends arbitration and shows that England's conduct was faulty during the Civil War. A year later, Johnson printed an important pamphlet, urging the United States to withdraw its claim for consequential damages.

In 1875, Johnson appeared for the last time in public, attacking the federal administration for its policy in Louisiana at a meeting in Baltimore in January. He presided and had a speech read for him, in September, in defense of the State Democratic ticket,

which contained the names of John Lee Carroll for governor and Johnson's son-in-law, C. J. M. Gwinn, for attorney-general. At that last meeting, he showed his interest in younger men, by reminding one of the other speakers, as he rose on the platform, to use an anecdote which he had recently told Johnson and which the latter had enjoyed. The same kindliness of heart was shown in his habit of having his little granddaughter read him every night after dinner the jokes she would cut from the daily papers, whereupon he, to show his appreciation of them, would place them in his pocketbook for preservation.

On November 6th, 1875, Johnson, with a son-in-law, went to England on legal business concerning lands in Florida, from which trip he returned on January 19th, 1876. Shortly afterwards, he wrote Senator Bayard that he had no doubt of the constitutionality of a Congressional appropriation for the Centennial Exhibition.

On February 10th, he went to Annapolis to be the guest of Governor Carroll, expecting to argue a case before the Court of Appeals on the next day. A number of gentlemen were invited to meet him for dinner and, after the dinner, Johnson asked permission to lie on a sofa in the library for a few minutes. When he was sought there, the room was found empty and his dead body was discovered lying on the ground on the north side of the Executive Mansion. Either he had mistaken an open window for a door and had stepped out and fallen into the paved

area below, or, as is more probable, he had left the house for a short stroll, turned close to the wall, stumbled on a lump of coal and fell against a projecting corner of the building, thus fracturing his skull.

When the news of his death became known, testimonials of love and respect came from every hand. Matthew H. Carpenter said:

Considering the extent and variety of his practice; his natural resources and professional attainments, his thorough self-possession and steadiness of nerve, when the skill of an opponent unexpectedly brought on the crisis of a great trial, an opportunity for feeble men to lose first themselves and then their cause, his fidelity to the oath, which was anciently administered to all the lawyers of England, to present nothing false but to make war for their clients, the audacity of his valor, when the fate of his client was trembling in the balance — he believing his client to be right, while every one else believed him to be wrong — remembering all these traits, we must rank him with the greatest lawyers and advocates of this or any other country.

Chief-Justice Waite, speaking for the Supreme Court, added:

He was extensively employed, with scarcely an interruption, in the most important causes. He was always welcome as an advocate, for he was always instructive. His friendship for the Court was open, cordial, and sincere. We mourn his loss, both as counsellor and friend.

SIDNEY BREESE.

SIDNEY BREESE

From a photograph in possession of the Honorable James B. Bradwell of Chicago.



SIDNEY BREESE.

1800-1878.

BY

STEPHEN STRONG GREGORY,

of the Illinois Bar.

SIDNEY BREESE was one of the pioneers of Illinois. The history of this state can not be written without some record of his life. And though countless thousands shall follow those first-comers, their figures, unless colossal, must always stand out less boldly on the skyline of history, than those of the builders of states and the pioneers of civilization.

It is not my purpose to attribute to him, who is the subject of this sketch, all the qualities belonging to the wisest, greatest and best of mankind; for I do not think he possessed them; nor to declare that as a judge, he illustrated all the virtues and had none of the faults of our common humanity. Let me rather give here a brief record of his life and, if I can, with truth and discrimination, so delineate his character, that those who knew him may recognize the picture; and those who knew him not, may perceive those commanding excellencies and sterling qualities that justly entitled him to the respect, confidence and ad-

miration, not only of the bar, but of the people of the imperial state, which he served so long and so faithfully.

Born at Whitestown, Oneida County, New York, July 15th, 1800, his father, Arthur Breese, was a lawyer, the grandson of Sidney Breese, a Welsh gentleman, formerly an officer in the English Army, who took up his residence in New York in 1756, and, after a successful mercantile career in that city, died there in 1767. His mother, Catharine Livingston, was of the distinguished family of that name, various members of which have played no small part in the history of our country. Utica, the capital of Oneida County, has been the home of great men and great lawyers; for there lived, at a later period, Horatio Seymour, Roscoe Conkling and Francis Kernan. These gentlemen all took an active and conspicuous part in public life, and, although they were all great lawyers, their fame is perhaps rather political than forensic.

Young Breese entered Hamilton College at the age of fourteen; but two years later went to Union College at Schenectady, New York. He graduated there at the age of eighteen, standing third in a class, many of whom afterwards, in various walks of life achieved great distinction.

He left New York where he had begun to study law, in the fall of 1818, just at the time Illinois was admitted into the Union, and arrived at Kaskaskia, December 24th.

Breese traveled, as we are told, from Buffalo to Sandusky by boat, then by stage to Marietta, by boat to Shawneetown and thence to Kaskaskia, then the capital of Illinois. He came upon the invitation of Elias Kent Kane, then Secretary of State, and an old friend of the Breese family. No doubt it was through the favor of Mr. Kane, that he became assistant secretary. At the same time he continued his professional studies, being admitted to the bar in 1820. He began the practice of his profession in Jackson County. It is said that he regarded his first appearance before a jury as such a lamentable failure that he almost resolved to give up his profession. The number of those who ought, even after many years of experience at the bar, to contemplate their own efforts in this direction with similar sentiments, is perhaps not inconsiderable. It is fortunate, however, that our young advocate did not act on his early impressions as to his own talents.

In December, 1820, he removed the books and records of the state department by wagon, to Vandalia, which had become the capital, and there opened the secretary's office in a small room in a rude frame building. He remained at Vandalia, in his official capacity, during the session of the Legislature. In 1821 he resumed his practice in Kaskaskia. In that year, though barely twenty-one years of age, he was offered, unsolicited, it is said, the appointment of postmaster. The next year he was appointed Circuit-Attorney, or public prosecu-

tor, for the Third Judicial Circuit of which Jackson County was a part. He resigned his position as postmaster, but continued to discharge its duties as acting postmaster until some time in the next year.

On Thursday, September 4th, 1823, he was married to Eliza, daughter of William Morrison, a prosperous merchant in Kaskaskia. Col. William R. Morrison of Waterloo, who served his country so faithfully, not merely upon the field of battle but in high legislative and executive office, is of the same family. Fourteen children were born of this marriage of whom six were living at the death of Judge Breese. Mrs. Breese also survived him.

In two biographical sketches of Judge Breese reference is made to a celebration at Kaskaskia on the 4th of July, 1823, at which he proposed the toast: "Ourselves—We paddle our own canoe, chew our own tobacco, and smoke our own segars." It is said that he was, all his life, addicted to the old-fashioned habit of chewing tobacco.

In 1825 Lafayette, on his return to this country, visited Kaskaskia. Young Mr. Breese attended a banquet in honor of the distinguished guest, as well as a great ball, given by his father-in-law, as a fitting climax to the festivities of the occasion.

Although a young man, we see him at this time easily and naturally assuming a place of leadership in the community where he lived and participating actively in all its public and social functions. In 1826, shortly after he ceased to be Circuit Attor-

ney, he was appointed United States District-Attorney by President Adams. He held this office until after the inauguration of General Jackson, by whom he was removed in 1829. Judge Breese felt that his removal was due to false and slanderous representations made by his opponents; but who these enemies were, or what derogatory statements they made concerning him, does not appear.

In 1831 he compiled and published the first volume of the reports of the Supreme Court of Illinois, a volume which is always cited by the name of the reporter. This was the first book published in the state and the reporter aided the printer in setting the type. In 1835, Judge Breese was elected Circuit Judge and thus entered upon that long and useful Judicial career, which continued up to the time of his death, except during the term of his service in the senate of the United States and a comparatively short period thereafter devoted to the practice of his profession. In November, 1835, Judge Breese removed from Kaskaskia to Carlyle, making his home on a farm known as the Mound Farm on the borders of the village, until 1845. He then moved into the village to live. Here he resided until his death, and a part of the farm having been incorporated into the village cemetery, his mortal remains were there laid to rest.

It is interesting as the narrative turns from the historic settlement of Kaskaskia which witnessed the early struggles and first successes of him of whom I

write, to recall something of this storied spot. It was the first permanent white settlement in Illinois having been established about 1718. There the first newspaper in the state was published bearing the ambitious title, *The Illinois Herald*. The publisher of this Journal was Mathew Duncan and its first number was issued September 6th, 1814. There also the Sisters of the Church early established a school, which was well patronized. The young girls as we are told learned the accomplishments of needlework and embroidery as well as how to cut and make garments, together with the rudiments of French and English. There was, in the spirit of the place and time, amid all the rude surroundings of pioneer life, a touch of Gallic grace and gaiety quite alien to the spirit of the early eastern settlements. The breezy freedom of the west added an element of cordial and hearty hospitality and kindness to all social intercourse. A German traveler thus refers to his visit to Kaskaskia about 1820:

After dinner I had the honor of being invited to tea at the home of Governor Bond where I, for the first time in the new world, found myself in a company of distinguished ladies. On the whole I was shown great attention and agreeable kindness. That which stands the stranger in good stead — who is usually too little acquainted with the language of the land and its customs — is the banishment from higher and lower society of all so-called etiquette and unnecessary compliments. The American never greets one by taking off the hat, but by a cordial grasp of the hand. One steps up to the most distinguished persons with covered head. He is urged little or not at all to eat and

drink according to the measure of his appetite. Nevertheless in all companies the greatest order and decorum prevails, and great respect and attention is shown to the ladies present.

Judge Breese himself in after years refers to his early home in Kaskaskia, in language which shows that he cherished fond recollections of his early life there:

It was there I passed some of the happiest moments of my life, and in her withered fortunes and waning glory, she wove a spell about my heart, which, it is no shame to say, separation has not broken, and coming age but adds to the potency of the enchantment:

" Yet does the memory of my boyhood stay,
A twilight of the brightness passed away."

It should be mentioned that in 1832, Judge Breese enlisted as a private in the Black Hawk War, and rose from the ranks to be Lieutenant-Colonel of a regiment of mounted volunteers.

Of Judge Breese as a circuit-judge the highest and most competent authorities speak in terms of unstinted praise. That great lawyer and statesman, Lyman Trumbull, has said:

In those times when courthouses were always crowded, and sometimes by persons disposed to be boisterous, Judge Breese possessed the happy faculty of commanding respect, and compelling the observance of order, with the least effort of any Judge I ever saw presiding on the Circuit, under like circumstances. It used to be said of him, that he looked the very Judge. He presided with dignity, was always courteous to members of the Bar, was quick to comprehend an argument, and see the points of a case,

was prompt in his decisions, and ready to give a reason therefor. Taken all in all, he was, in my opinion, the ablest Circuit Judge before whom it was ever my fortune to practice.

John M. Palmer, a contemporary of Judge Trumbull's, a great lawyer, soldier, senator of the United States and Governor of Illinois, in describing his first appearance before Judge Breese said:

He made an impression upon me that still remains, and secured for himself my best personal services as long as he had occasion for them; and he left upon my mind an impression which I still retain, that Sidney Breese was in all respects an ideal judge, and, in view of his inaptness as a politician, I have been inclined to repeat what Dryden says of Shaftesbury:

'In Israel's Courts ne'er sat an Abeth-den,
With more discerning eye or hands more clean;
Unbribed, unsought, the wretched to redress,
Swift of dispatch and easy of access.
O, had he been content to serve the Crown
With virtues only proper to the gown;
Or had the rankness of the soil been freed
From cockle that oppressed the noble seed,
David for him, his tuneful harp had strung,
And Heaven had wanted one immortal song.'

The Judge was for some reasons a failure as a politician, but his preëminence as a judge has never been disputed.

The verse is excellent, but I am not quite clear that it is altogether applicable to Judge Breese; and I have only included it as a part of what General Palmer said in expressing his opinion of Judge Breese as he first saw him at the Circuit.

In 1841, Judge Breese was elected a justice of the

Supreme Court of his state, taking his seat February 22d, of that year. He was elected Senator of the United States, December 18th, 1842, and on the next day resigned his place on the bench. His activities in the Senate were considerable. Probably he devoted more time and energy to his high and important official duties than he did to looking after the personal fortunes and private interests of individuals who supposed they had some claims on him or his party. This may be what made him, in the eyes of some, a poor politician. But his course in the senate showed him to be a sagacious statesman if not a facile politician.

In 1847 Stephen A. Douglas became the colleague of Judge Breese as senator of the United States. A very distinguished man, himself an adopted son of Illinois and the friend of both of these great men, has declared that of both it could truly be said in the language of Demosthenes—"No convenience of opportunity or insinuation of address, or magnificence of promises, or hope or fear or favor, could induce them to give up, for a moment, what they considered the rights and interests of the people." What higher praise can be bestowed upon any faithful servant of the public?

Judge Breese advocated a tariff for revenue only and voted for the low tariff act of 1846. He voted against the treaty by which the disputed Northwest boundary line between this country and the British possessions was finally established. He supported

the Mexican War, favored the annexation of Texas and voted for the measures by which this was accomplished.

He had written in 1835 a public letter advocating the construction of a railway from some point on the Illinois and Michigan Canal running south through the central portion of the state to Cairo. While in the senate, he advocated a Congressional grant of lands to Illinois to aid in the construction of such a road, and introduced in 1846 a bill for that purpose. As chairman of the Committee on Public Lands, he made the first adequate report which was ever made to Congress on the subject. In 1848, he made another report on a bill, similar to his own, introduced by Douglas. In 1850, after his term as senator expired, his bill, consolidated with a bill introduced by Senator King of Alabama, became a law. In 1851, the Illinois Central Railroad Company was chartered by the State of Illinois and made the beneficiary of this grant. Judge Breese was then Speaker of the House of Representatives of his state; and in a public letter written in that year he said:

I claim to have first projected this great road, in my letter of 1835, and in the judgment of impartial and disinterested men, my claim will be allowed. I have said and written more in favor of it than any other. It has been my highest ambition to accomplish it, and when my last resting place shall be marked by the cold marble which gratitude or affection may erect, I desire for it no other inscription than this: that he who sleeps beneath it, projected the Central Railroad.

But his efforts in behalf of a similar, but larger and more strictly national enterprise, furnish even a better title to posthumous fame.

Building a railway across the level, fertile and productive prairies of Illinois, was an insignificant undertaking compared with the construction of a railway spanning the continent, crossing the Rockies, traversing the alkali plains of the west and terminating on the shores of the Pacific. Of this great project, Judge Breese was one of the earliest, most sagacious and influential promoters.

In February, 1846, a memorial by A. Whitney for a grant of public lands to enable him to construct a railroad from Lake Michigan to the Pacific was presented to Congress and, in the Senate, referred to the Committee on Public Lands. In July following, Judge Breese as Chairman and on behalf of that Committee, made an exhaustive report in favor of this scheme reporting also a bill to carry it out. This report is before me as I write. It embraces without the various appendixes over sixty printed pages of an ordinary octavo volume. It deals elaborately with the whole subject, particularly with the oriental trade to be secured by the easy communication, thus to be established, between the Pacific Coast and the rest of the country. His anticipations in this regard have not been fully realized even yet, owing principally, the writer believes, to our narrow and benighted policy as to all questions of foreign trade and intercourse.

No one can read this report now without being impressed with one of its omissions. It contains no hint of any knowledge that these barren mountain ranges of the west were teeming with a wealth of mineral almost beyond calculation. This was shortly prior to the great gold discoveries in California. The route recommended as the report states, "pursues the valley of the Columbia River by the Lewis branch thereof, to the great South Pass; and thence nearly due east, striking the Missouri above the mouth of the great Platte River, and the Mississippi above the mouth of the Wisconsin River, until it strikes the shore of Lake Michigan." It does not detract from the merit of this report that the first great transcontinental railway did not follow this line; nor is Milwaukee, which would be about the point on Lake Michigan indicated in the report, the terminus of any such railway. This is a mere detail. In the opening sentences of the report the Committee declare "that they have bestowed on this proposition that consideration its importance demands, and which but a few years since, in the then existing state of the arts and sciences, a Committee of this body would have been excused for treating as a visionary speculation." With the report was submitted a map showing the proposed railroad which was not printed with the report owing, it is said, to some jealous opposition on the part of Senator Benton of Missouri.

No man can be truly great as a statesman or as a

judge who is not somewhat in advance of his age and time. No doubt that which they see before their fellows, must soon become visible to all. For Macaulay well said:

Society, indeed, has its great men, and its little men, as the earth has its mountains and its valleys. . . . The sun illuminates the hills while it is still below the horizon, and truth is discovered by the highest minds a little before it becomes manifest to the multitude. This is the extent of their superiority. They are the first to catch and reflect a light which without their assistance, must in a short time become visible to those who lie far beneath them.

Tried by this test Sir Matthew Hale, though a learned and just-minded man, was not a great judge; for he shared in the ignorant and cruel belief in witchcraft so generally prevalent in his time. In this sense, Camden, of far less learning, was a great judge, because he administered the law in a spirit far in advance of his age; while Romilly, likewise inferior to Hale in learning, as a merciful reformer of the law of England, showed this genuine evidence of greatness in a most conspicuous degree. And so Judge Breese in his conception and apprehension of the utility and practicability of a transcontinental railway, at a time when, to the mass of men, it seemed chimerical, demonstrated this quality of greatness and showed that he was in advance of his time. He lived to see this great work completed and in successful operation. But his agency in promoting it has never received the recognition which it merited,

nor, in the general rejoicing at its accomplishment, was he accorded a place of honor, nor was his early service in connection with it, made the subject of mention or remark.

He left the senate March 3d, 1849, reluctantly, I think. Almost every one who has occupied high station at the national capital, seems to leave it with regret. General James Shields, a wounded hero of the Mexican War, was chosen as his successor.

Judge Breese resumed the practice of his profession and as already mentioned, served as speaker of the House of Representatives in 1851. He declined a nomination for the position of Justice of the Supreme Court of his state in 1853; and some of his contemporaries have found in this fact, and some political activity, which he manifested at this time, evidences of a desire to return to the senate. In 1857 he was elected to the Supreme Bench and continued by successive elections a member of that Court until the time of his death.

Owing to what the writer regards as a foolish system, that Court has no real chief-justice. Each member of it serves in rotation as the head of the Court. This will account for the fact that Judge Breese appears as chief-justice during part of his service and subsequently as an associate.

He served on this Court for more than twenty consecutive years and it is to his labors in this capacity that he chiefly owes his just fame and extended professional reputation. When he became

for the second time a member of the Court, the great struggle concerning slavery which immediately preceded the Civil War was raging bitterly. That terrible and fratricidal strife followed, to be succeeded by an entire change in the social order—a period of feverish and rapid material and national growth, followed by a great commercial and financial revulsion, from which the country was just recovering at the time of his death. The old order was passing away, the traditions of the past were shattered and the national life passed from the simple semi-rural tone that had before marked it, into that eager, restless pursuit of material well-being, which seems now at its very height. All these social perturbations find expression and illustration in contemporaneous jurisprudence.

His first opinion was written in *Duncan vs. McAfee*.¹ That case had been heard before him at the Circuit; and his judgment was affirmed by the Supreme Court.² In *Maus vs. Worthing*,³ Abraham Lincoln moved to dismiss an appeal because the appeal bond was executed in the name of a surety by an attor-

¹ Scammons Reports, 559. His opinions when he was first a member of the Supreme Court, appear in Volumes 2 and 3 of Scammon's Reports. They begin again, on his second secession to that Bench, in Volume 19 of the Illinois Reports, continuing to Volume 89 inclusive.

² Judges who have presided at the Circuit do not now sit, in Illinois, to review cases which they have decided below. This is certainly a good rule, the practice to the contrary in the Supreme Court of the United States, might well be changed. This now is, however, of little practical importance as the justices of that court do so little at Circuit.

³ Scammon's Reports, 26, July term 1841.

ney in fact; and the letter of attorney was not under seal. The Court sustained the motion and dismissed the appeal. Judge Breese dissented in his usual vigorous and characteristic fashion. Among other things he said:

The rule as laid down seems to me to be destitute of any good reason on which to base it, and altogether too technical for this age. How a scrawl made with pen and ink affixed to the name of the writer of the letter which is the authority to execute the appeal bond, could give it any additional validity, I cannot discover. It is conceded, if the writer's name had this magical scrawl affixed to it, it would then be sufficient, and it would then possess all the efficacy of a sealed instrument or deed. . . . I can not consent to yield up my judgment, in any case, because others have decided a point in a particular manner, unless I can see the reason of the decision. Seeing none in this case, and believing that the purposes of justice are not all subserved by an adherence to such antiquated rules and unmeaning technicalities, I dissent from the opinion. . . . Several of my brother Judges coincide in the views here expressed, but think the rule is the law, with which they can not interfere, it being for the legislative power to change it. I think differently. I am of opinion that Courts are bound to see the propriety and reason of every rule, before it receives their sanction and approbation, in cases wherein there are no statutory provisions applicable; in such cases the will of the legislature, as expresed by them, is the law, however unwise or unreasonable it may be, if no constitutional provision is violated. Not so in other cases. We should know the reason why it is, and should be so; and if the alleged reason is absurd, we should not yield our acquiescence.

This reasoning is attractive but not altogether sound. It would result in much confusion if every time a question were presented to a Court of last

resort, it were to be decided in the light wholly of reason, without regard to authority. What is reasonable to the mind of one Judge is most unreasonable to that of another. Therefore, in order to have any kind of stability, there must be acquiescence in long established precedent, though to some Courts or Judges, the rule thus fortified may seem to be unsupported in sound reason. Moreover Municipal law is complex and extensive. A Court sometimes, in a partial view, condemns as unreasonable, that which, in the light of wider and fuller consideration, has quite a different aspect. The remarks of Judge Breese seem to indicate that, in his opinion, a scroll added to a signature ought not to modify the instrument. But there are cases where it seems to me quite desirable that this principle of the law should have effect. If a man wishes to acquit his debtor and give him a receipt in full on payment of a less sum where the claim is undisputed this is, by the common law, no bar; but if he give a release under seal this is a bar.

As individuals are compelled constantly to act, trade, contract and regulate their civil conduct by the law as announced by the courts, stability is after all one of the first requisites in Judicial determination by Courts of last resort. On great fundamental questions, after full consideration and where the public interest seems imperatively to demand it, a departure from authority may be justified; as always on minor questions of practice and procedure where

experience has demonstrated the impropriety of rules theretofore announced.

In Campbell vs. Whetstone,⁴ which had been tried below before Judge Breese, he wrote the opinion of the Supreme Court reversing his own judgment.

The most important case during his first service on the Court, in which he wrote the opinion, is undoubtedly Stuart vs. The People.⁵ This was a writ of error to the Circuit Court of Cook County, presided over by one John Pearson, sued out to reverse a judgment of that Court punishing Stuart for contempt for publishing, as proprietor of the Chicago American, an article supposed to reflect on the Court and Jury in a murder trial. Judge Pearson had himself been convicted of a gross contempt of the authority of the Supreme Court and fined accordingly. Stuart was the editor of a Whig paper and criticized the conduct of John Wentworth then editor of a Democratic paper and one of the Jurors in the case referred to. Mr. Wentworth was one of the oldest and best known of Chicago's early citizens. He was Mayor and member of Congress and held other offices, having, after the incident referred to, become a Republican.

Judge Breese declined to follow the Common law of England as to constructive contempts, and among other things said: "Constitutional provisions are

⁴ 3 Scammon's Reports, 361.

⁵ 3 Scammon's Reports, 395.

much safer guaranties for civil liberty and personal rights than those of the common law, however much they may be said to protect them.

Our Constitution has provided that the printing presses shall be free to every person who may undertake to examine the proceedings of any and every department of the government, and he may publish the truth, if the matter published is proper for public information, and the free communication of thoughts and opinions is encouraged. . . . An honest, independent and intelligent Court will win its way to public confidence, in spite of newspaper paragraphs, however pointed may be their wit or satire, and its dignity will suffer less by passing them by unnoticed, than by arraigning the perpetrators, trying them in a summary way, and punishing them by the judgment of the offended party.

It does not seem to me necessary, for the protection of Courts in the exercise of their legitimate powers, that this one, so liable to abuse, should also be conceded to them. It may be so frequently exercised, as to destroy that moral influence which is their best possession, until finally the administration of Justice is brought into disrepute. Respect to Courts can not be compelled; it is the voluntary tribute of the public to worth, virtue and intelligence, and whilst they are found upon the judgment seat, so long, and no longer, will they retain the public confidence. If a Judge be libelled by the public press, he and his assailant should be placed on equal grounds, and their common arbiter should be a Jury of the Country; and if he has received an injury, ample renumeration will be made.

He referred to the power to punish for contempt as "not a jewel of the Court, to be admired and prized, but a rod rather, and most potent when rarely used." The judgment below was reversed. From the decision of the Supreme Court Judge Douglas dissented.

Among the associates of Judge Breese at this time Stephen Arnold Douglas was easily the most distinguished. He was then but twenty-nine years of age. Those born since the memorable struggle over slavery which marked the decade preceding the Civil War, have but little conception of what a commanding figure he then was in that great drama. Belittled and maligned as he has been by the petty ministers of partisan rancor, no candid man can read attentively the history of the last two years of his life, can contemplate the bold and heroic stand he took against the Lecompton Constitution in the discussions on the Kansas question; and read his daring declarations made throughout the south in his campaign for the presidency, that the election of Lincoln would furnish no warrant for secession, and that if it were attempted, he would so far as he was concerned treat it as Andrew Jackson treated nullification and support the exercise of every power of the national government to suppress it; no honest man can turn these pages of history without feeling his heart beat quicker, without saying to himself: There was a great orator, a true patriot, a courageous statesman and a great American. Others were then on the bench, since perhaps more distinguished professionally than Judge Douglas. John Dean Caton, a most learned, industrious and faithful judge, an excellent man of business, one of the founders of the Western Union Telegraph system, a naturalist of no inconsiderable attainments, whose work on the

American Deer is a valuable contribution in its peculiar field, was also on the Court at this time; as were Judge Samuel H. Treat, afterwards for many years Federal Judge for the Southern District of Illinois, Samuel D. Lockwood, Thomas Ford, afterwards Governor of the State, and Walter B. Scates, all men of marked ability and conspicuous in the history of the state. Among such associates Judge Breese always fully maintained himself and retained their confidence and respect.

Without attempting an extended review of his judicial labors after he again went upon the Supreme Bench, a few of the more prominent cases will be noted.

The Chicago Evening Journal published an article criticizing the Court in a criminal case. The publishers were brought before that tribunal and fined for their contempt. The questions presented were similar to those involved in *Stuart vs. People*. Judge Breese and two of the remaining six judges dissented from this opinion.⁶ The main opinion in this case was written by Charles B. Lawrence, one of the most accomplished and upright judges that ever adorned the bench in Illinois. It is interesting to note, however, that, notwithstanding his high qualities for judicial office, when his term expired he was, in no small part on account of this decision, defeated for reelection. Possibly other influences more directly contributed to this result; but that his po-

⁶ *People vs. Wilson*, 64 Illinois Reports, 195.

sition in this case had its adverse influence, admits of no question.

The writer thinks Judge Lawrence was wrong and Judge Breese was right on this great elementary and constitutional question; and that the strong popular sympathies of Judge Breese and his leaning toward civil liberty led him to a correct judgment.

The next two cases reveal the man rather than the Judge. *Jumpertz vs. People*,⁷ was a capital case where the crime, if committed at all, was attended by circumstances of peculiar atrocity. The defense was that the unfortunate victim had taken her own life. It is impossible now, nearly fifty years after this forgotten tragedy, for a man of feeling to read the harrowing details in the report of the case without sensibility. These considerations undoubtedly affected Judge Breese; for while the Court, on most undoubted error of law, pronounced judgment of reversal, he dissented. He said:

A homicide, unexampled in the annals of any country, has been committed in our largest city, under circumstances of the greatest atrocity, and, under the ruling of the Court, the guilty party may go unwhipt of Justice. . . . Should such a criminal escape, the Justice of the State might well be impeached. "*Judex damnat, cum nocens absolvitur.*" There is not in my judgment a single prominent fact in this case, consistent with the innocence of the prisoner, but

"In law, no plea so tainted or corrupt,
But being seasoned with a gracious voice
Obscures the show of evil."

⁷ 21 Illinois Reports, 375.

I am not quite sure that Judge Breese was altogether a merciful judge. A judge who, sitting on an Appellate Court, dissents in a capital case, from a judgment of reversal, is necessarily open to some suspicion on this point. Yet in a later case, also capital, he certainly expressed sound views and showed a strong disposition to accord his full rights to a wretched lunatic. Nor did he hesitate to declare that Sir James Mansfield in 1812, adopting erroneous and obsolete rules as to the criminal responsibility of the insane, had, in the case of Bellingham, condemned an undoubted lunatic to the gallows. Unfortunately Sir James was not the last judge to commit such a horrible judicial blunder, nor is England by any means the only country in which such official tragedies have occurred.

In *Bass vs. Chicago, Burlington and Quincy Railroad*, it was determined that a railroad company was liable for damages to property near their right of way occasioned by negligence of its employer. The case went up on demurrer to the declaration, that pleading averring that the company's employees, present at the fire and knowing its origin to be attributable to sparks escaping from a locomotive, made no effort to extinguish it. On this Judge Breese remarked:

The plea set up by the defendant for the refusal is so absurd as to be unworthy of notice, any further than to stamp it as unworthy of civilized and Christian men. They had no right, forsooth, to enter upon the premises for such a purpose. Has it

come to this, that citizens of this community are not permitted to enter the premises of another, whose house or barn is on fire, to extinguish the flames? Is any license necessary for a purpose so benevolent? Would not savages, prompted by their own instincts, rush to the rescue of property so endangered? It is sad and humiliating to contemplate the fact, that employees of a railroad company acting under a charter granted by this state, should be so lost to all the calls of benevolence and kindness — to all the common instincts of the most ordinary humanity, as to refuse to aid in extinguishing a fire, which their own employees, by their negligence, had originated, which threatened the destruction of valuable property, and which they had the power to prevent. We are shocked at the exhibition of such heartless, such criminal indifference, and can find no apology for it.

This is rather exaggerated in tone for judicial writing. The chief "humiliation" to lawyers on reading it seems to me to be that eminent counsel, in a court of last resort, should have suggested the preposterous argument to which Judge Breese refers; and that the court below should have so grossly erred in so simple a case.

In *Rutherford vs. Morris*,⁸ Judge Breese made some characteristic observations on expert evidence. The case was a contest by bill in equity respecting testamentary capacity and the Court was—"Impressed with the great importance of this case to the parties litigant, and considering the large amount of property involved, some one hundred thousand dollars or more," etc. This amount seems smaller now. As to the experts it was said:

⁸77 Illinois Reports, 397.

These doctors were summoned by the contestants, as "experts" for the purpose of invalidating a will deliberately made by a man quite as competent as either of them to do such an act; they were the contestant's witnesses, and so considered themselves, Dr. Bassett especially, whose whole testimony is pregnant with such indications. The testimony of such is worth but little, and should always be received by Juries with great caution. It was said by a distinguished Judge, in a case before him, if there was any kind of testimony not only of no value, but even worse than that, it was, in his judgment, that of medical experts. They may be able to state the diagnosis of the disease more learnedly, but, upon the question whether it had, at a given time, reached such a stage, that the subject of it was incapable of making a contract, or was irresponsible for his acts, the opinion of his neighbors, if men of good common sense, would be worth more than that of all the experts in the country.

Apparently only one member of the court concurred in this opinion. One dissented, one wrote a brief memorandum concurring in the judgment and three filed a separate opinion for reversal.

The entire subject of competency to contract or to make a will, as well as the question of how far disease of the brain relieves from criminal responsibility, is indeed a difficult one. But it is to be feared that its difficulties are by no means lessened, nor the correct solution of the problems thus presented, facilitated, by such contributions to the literature of the discussion as that just quoted. At the time Judge Breese wrote this opinion he was seventy-five years of age. Few men show much hospitality toward new ideas after reaching the age of forty. Nervous or brain force works along the lines of least resis-

tance; and the channels of mental activity are usually well established at middle life. It would have been too much to expect a judge of the age and experience of Judge Breese to have any very profound apprehension of modern physiology and pathology in this obscure and difficult field. In all matters of opinion, men will differ; doctors not more than lawyers nor even, frequently judges, as the number of dissenters in important cases well illustrates. Therefore, much of judicial criticism of experts in this regard had better be either entirely suppressed, or at least mollified by a more charitable tone, obviously suggested by the like failings of the authors of such criticism.

It is a pleasure to turn now to other cases, the opinions in which, written by Judge Breese, and dealing with great questions of government which he had made the study of a lifetime, fully justify the high position as a judge accorded to him by his contemporaries and recognized by those who have followed them. When the parks of Chicago were first established on a large scale two different methods were attempted. An Act of the Legislature was passed for the appointment of commissioners to manage Lincoln Park on the north side of the city; for the purpose of raising moneys to pay for the land acquired for the park, the commissioners had power to cause bonds of the city to be issued; to be paid, of course, by the tax-payers. As to the south parks the Commissioners were to be appointed in like manner,

and with similar powers, but before the Act became operative it was to be submitted to the voters whose property was to be assessed to raise the necessary funds.⁹ Judge Breese wrote the opinions in both of the cases. These opinions are able, thorough and persuasive, founded in strong reason and sound logic and based upon the great fundamental idea that in this country the people rule. In the first, or North Side case, the scheme was clearly unconstitutional and the Court so held. It was there said, among other things:

It will hardly be contended, that the legislature can compel a holder of property in Chicago to execute his individual bond as security for the payment of a debt so ordered to be contracted. A city is made up of individuals owning the property within its limits, the lots and blocks which compose it and the structures which adorn them. What would be the universal judgment should the legislature, *sua sponte*, project magnificent and costly structures within one of our cities, triumphal arches, splendid columns, and perpetual fountains, and require, in the act creating them, that every owner of property within the city limits should give his individual obligation for his proportion of the cost, and impose such cost as a lien upon his property forever? What would be the public judgment of such an act, and wherein would it differ from the act under consideration?

Again the opinion proceeded:

. . . If the principle be admitted that the legislature can, uninvited, of their mere will, impose such a burden as this upon the city of Chicago, then one much heavier and more onerous can be imposed, in short, no limit can be assigned to the legislative

⁹ People vs. Mayor of Chicago, 51 Illinois Reports, 17; People vs. Solomon, 51 Illinois Reports,

power in this regard. If this power is possessed, then it must be conceded that the property of every citizen within it, is held at the will and pleasure of the legislature. Can it be, that the general assembly of the state, just and honest as its members may be, is the depository of the rights of property of the citizen? Would there be any sufficient security for property if such a power were conceded? No well regulated mind can entertain the idea, that it is within the constitutional competency of the legislature to subject the earnings of any portion of our people to the hazards of such legislation.

We fail to perceive any real difference, in principle, in forcing this burden upon the city, and imposing a like burden, by the direct action of the legislature upon individual property owners without it, for in both cases, the debt, at maturity, must be paid by such holders, while the accruing interest is a constant drain upon their resources.

In the South Park cases, the plan there proposed was held admissible under the Constitution; and in the course of the opinion Judge Breese laid down the salutary and familiar doctrine,—a very basic truth of popular government,—as follows: "The whole legislative power of the state, is conferred by the Constitution, upon the general assembly, composed of two houses, the members of both to have certain qualifications and to be elected by the people. It follows, therefore, that every subject, not withdrawn from them by the Constitution, and which is within the scope of civil government, can be dealt with by that body and as it may act upon the state at large by general laws affecting the whole country and all the people, so it may, in its discretion, there being no prohibition expressly made, or necessarily

implied, make special laws to relate only to separate districts or portions of the state. The members of the two houses, are the Constitutional agents of the public will in every district or locality of the state, and they may, therefore, so arrange the powers to be given and executed therein, as convenience, the efficiency of administration, and the public good may seem to require, by committing some functions to local jurisdictions already established, or by establishing local jurisdictions for that express purpose." This sound and just doctrine has been, in more recent times, overlooked by the Supreme Court of Illinois as well as other Courts; and such tribunals, in deciding upon the validity of legislation, seem sometimes to have supposed themselves to be "the Constitutional agents of the public will," entitled to substitute their own views for the legislative judgment, and to condemn legislation upon some vague theory that it was in their opinion against common right or contrary to their own views upon some social or economic question.

It will be appropriate to conclude this discussion of Judge Breese's decisions with some reference to the historic case of *Munn vs. People*.¹⁰ I am inclined to think this is the most important case decided by any Court in this country during the last thirty years. Its doctrine is so fundamental and of such vast importance in the social, industrial and

¹⁰ 69 Illinois Reports, 80; affirmed in Supreme Court of United States under the same title; see 94 United States Reports, 113.

governmental problems with which the people of this country are now confronted, that I believe it has grown, rather than diminished in significance, since it was first promulgated.

The case was originally a criminal information in the Criminal Court of Cook County, in which Chicago is situated, charging the defendants with conducting an elevator or warehouse for the storage of grain without a license. The defense was that the statute of Illinois requiring this license was unconstitutional, inconsistent both with the constitution of the state and the United States, in that it fixed maximum rates of storage, and thus deprived the warehouse owners of their property without due process of law. Judge Breese, then Chief-Judge under the system to which I have alluded, wrote the opinion of the Court. Judge McAllister, a lawyer of a very high order of ability, dissented and one other justice concurred with him. Subsequent decision has in a measure justified his dissent, though leaving the great underlying principle of the decision untouched.

Judge Breese first considered the point that the 14th Amendment to the Federal Constitution prohibited such legislation and dismissed it summarily with the suggestion that the Amendment was wholly inapplicable. It is familiar law now that the inhibition therein against state action depriving any person of life, liberty or property without due process of law, is a restriction on the power of legislation existing in the states. On this first point, there-

fore, Judge Breese was in error. The Amendment was just as applicable to the case then before the Court as the provision in the State Constitution that no person should be deprived of life, liberty or property without due process of law. As to the main question in the case the constitutionality under the State Constitution of the Act fixing maximum rates for the storage of grain, Judge Breese said:

Government, in this state, is reposed in three departments composed of separate bodies of magistracy. The whole legislative power is vested by the constitution in the General Assembly, composed of two houses, the members of each to have certain qualifications and to be elected by the people. Every subject within the domain of legislation and within the scope of civil government not withdrawn from it by the constitution of the state, or of the United States, can be dealt with by that body by general laws to affect the whole state and all the people within it. That body is, emphatically, the guardian of the public interests and welfare, and would be derelict in its duty did it fail to exercise all its powers to their promotion and protection. That body is the sole judge of such measures as may advance the interests of the people. Coming, as its members do, directly from the people, and of them, they know the course of trade, the manner in which the great internal commerce of the state is conducted, and by what instrumentalities, and how, by them, the producing and other interests of the state are affected. These, it must be conceded, are all fit subjects for legislative consideration, and, independent of any constitutional provision, they would have an undoubted right, knowing that a large proportion of our cereals, to reach the markets of the world, were compelled to pass through certain warehouses, called elevators, and subjected to such charges as their owners might see fit to impose, to take up this whole subject as one legitimately within their domain; and, if, in their examina-

tion of it, they find the owners and managers of these warehouses are an organized body of monopolists, possessing sufficient strength in their combination and by their connection with the railroads of the state, to impose their own terms upon the producers and shippers of these cereals, to the great detriment of the latter, who are under a kind of moral duress in resorting to them, can it be said to be a usurpation of power on the part of the legislature to bring them in subjection to law, so to regulate their conduct and charges by law, as to prevent oppression and extortion? Can there be a more legitimate subject for the action of a legislative body? We think not. Shall it be said an interest so vast as this does not deserve governmental care, and is not a proper subject of some kind of governmental control? And if, in the means provided by the legislature to that end, some reduction in their monthly or annual receipts may be the result, can it be said the owners are thereby deprived of their property? . . .

It is idle to talk about the consent of their customers to higher rates of charges than this law allows them to receive. Their customers, before this law was enacted, had no protection against these monopolists. They had no consent to give. They were obliged to have their grain taken to these warehouses, and be subjected to such charges as the organized combination, shutting out all competition, might choose to demand. The producer and shipper had no alternative but submission. They were completely in the power of this combination and it did not fail to demand and exact the highest charges. It is this state of things the law is designed to remedy. One of the first and most imperative duties of the law-making power is, to enact all necessary laws to remedy existing evils, taking care, in so doing, not to transgress any constitutional limitation. The means by which to do it most effectually, is in the discretion of the legislature, keeping in view the provisions of the organic law.

It is true that this doctrine now requires modification. It is well settled by the decisions of the

Supreme Court of the United States, promulgated since the opinion under consideration was filed, that where a state, in the exercise of its legislative power to determine rates of charge for the public service of private corporations or individuals, so limits the return that may be demanded for the use of property as to prevent them from receiving what, in the judgment of the Court, is reasonable compensation, then the action of the State Legislature is void, as it amounts to a deprivation of property without due process of law, within the meaning of the Fourteenth Amendment.

But the great central proposition expressed, sustained by the same high tribunal on error to reverse the judgment of the Supreme Court of Illinois in that case, that where property is devoted to a public use, its use may, in a measure, be controlled and compensation demanded for such use may be limited by the state, still stands as the law of the land.

At the time this case was decided at Washington, there were a number of other cases pending there, involving the right of various states, by legislation, to regulate railway charges or rates. The Court delayed its decision in these cases until *Munn vs. Illinois* was decided, so as to make it clear that the rule announced by the Court rested in all the cases on the fact, that in each, property was devoted to a public use, and did not depend on the question whether the owner or user of such property was a corporation or an individual.

I have made this reference to cases in which Judge Breese wrote for the Court, not merely to illustrate the important and momentous questions in the decision of which he participated; but rather that the reader may see, in the extracts given, somewhat of the man. The late James C. Carter is quoted as saying, when one of his most distinguished contemporaries was under discussion: "Sir, he is incapable of a righteous indignation." No one could truthfully say this of Judge Breese. Indeed it is not impossible, as is sometimes the case with men of strong feelings and deep convictions, that these, in effect, colored and warped his judgment. But the indignation of Judge Breese was righteous. It was directed against what he felt to be fraud, injustice and oppression. The too colorless man on the bench sometimes lacks the dynamic force which deep feeling supplies, and which enables the possessor to assail successfully great wrongs, even though they are securely entrenched by tradition, or by extraneous influence.

Judge Breese was a man of learning in the law. It is true he had not the habits and instincts of an investigator,—that peculiar patience which induces a certain slowness and suspension of judgment until everything has been worked out to the very last analysis. His opinions, however, show a marked familiarity with the literature of the law, and such a broad and comprehensive grasp of its fundamental principles, as we might expect in a man of his extended and varied experience and native vigor of mind. There

was something, too, of confidence in his own judgment, and capacity which is a most desirable attribute in a judge. Nothing is more distressing than to present difficult and complicated cases requiring wisdom and courage in their solution, to a feeble-minded judge, incapable of comprehending them, who feels himself overborne and outclassed by counsel and unable adequately to grasp the questions which he is called upon to determine.

Judge Breese was, as his opinions show, a man of unremitting industry. He was also the master of a fine, flowing, sometimes florid, literary style. It was not always as concise and severe perhaps, as that which should mark the opinions of an ideal judge. Neither was that of John Marshall. It will be found that some of his judgments were rather discursive. Unlike Breese, however, he did not write *calamo currente*; but, with ample time for consideration and reflection, he proceeded, with great apparent deliberation and in measured and systematic demonstration, to those conclusions which, in the light of his cogent and luminous reasoning, appear to be logical and inevitable. Unlike Breese he never cut the Gordian knot, however tightly involved; he always proceeded, slowly and irresistibly, to untangle and disengage it.

It is said that Judge Breese had a wide acquaintance not merely with the literature of the law but with general literature and with the Latin and English classics, and a memory so retentive that he not

only remembered all the law he ever read and where to find it, but could delight his friends with apposite and extended quotations from the great writers and thinkers, upon almost every topic.

He was in a true sense a Democrat. It is interesting to note his opinion of Marshall expressed in a speech in 1840.

Although an upright Judge, and highly gifted, he was of the Federal school of politics, and was a latitudinarian in his construction of the Constitution. For a Democratic people, his opinions on Constitutional law, in cases of this kind, are worth little, and he was an unsafe guide to which to commit our political ship.

This has a familiar sound, "Alas, poor Ghost." Marshall was right and Breese was wrong. If Thomas Jefferson were with us in public life to-day, he would be alert, not so much against the extension of national power at the expense of state authority, as in the great struggle now in progress to oust privilege and the privileged classes from high places, and to restore government, both state and federal, to the hands of the people.

In '76 national tyranny and oppression through the powers of a monarch, constituted the danger to liberty which our fathers strove to avert. It is not so to-day. The conservatives appeal to Jefferson, forgetting that in life he was hated and feared as a radical and, indeed, a dangerous revolutionist. He looked forward and not backward and took and occupied advanced ground in the great contest for freedom and the rights of man.

Judge Breese was a Democrat in that he espoused the popular cause, believed in the rule of the people and in their wisdom and capacity for self-government. And in the great case of *Munn vs. Illinois* he sounded the first bugle in the great struggle of the people against privilege on the lines on which it is now being conducted; that never ending struggle which must last as long as human nature shall remain what it is.

Two of the contemporaries of Judge Breese have expressed opinions of him which are worth repeating here. Judge John M. Scott, for many years his associate on the Supreme Bench, has said:

Judge Breese was a man of great learning, in the best and broadest sense of that term. To the studies prescribed by the college of which he was a graduate, he added a life-time of study. Notwithstanding his constant employment in public life, he found time for the study of classic literature, both in the Latin and English languages. After the close of the labors of the day, extending to a late hour of the evening, I have often known him, in his private room, before retiring, to spend hours in reading standard works in literature and on scientific subjects. It was his constant habit. It is a marvel the amount of intellectual labor he could endure. . . . Of the faculties of his mind, none was more remarkable than his memory, and what is most singular, it suffered no failure in his last days.

Judge Pinkney H. Walker, another member of the Court during a large part of Judge Breese's service, said of him on the same occasion:

He grasped and comprehended truths in their full scope as applied to human action; he sought and mastered the great prin-

ciples underlying all questions connected with government, law and civilization. He cared little for forms, where right and principles were involved, looking almost entirely to principles that should govern. His intellect was massive and vigorous, rather than quick and acute, never regarding or being attracted by nice or impalpable distinctions. His convictions were deep and permanent, and he never wavered or halted when an opinion was once found, and yet, he was not always self-reliant in the application of legal principles. His nature was strong, ardent and impulsive. He had great mental energy and indomitable will. His investigations were direct, and his mode of reasoning strictly logical. His plan of analysis was large, and his perception of facts was clear and remarkably comprehensive, with a singular facility for freeing a question from all extraneous matter.

If I were to expound this commentary at all, I should say that the statement that Judge Breese was not always self-reliant in the application of legal principles, which seems so much at variance with all else here said of him, refers to the undoubted fact that, owing to some lack of that faculty of analysis and keen discrimination to which Judge Walker refers and which has before been alluded to, Judge Breese sometimes found difficulty in satisfying himself as to what legal principle, in a close and doubtful case, should be applied to the facts in the record. Every Judge and lawyer is often confronted with this difficulty. I would not say that it was one which particularly attended upon Judge Breese; but rather that possibly the faculty of nice analysis and close discrimination was not developed in him to the point that might perhaps have been expected, in a man of

his commanding and impressive intellectual equipment.

The late E. B. Washburne, however, writing to the late Isaac N. Arnold from Paris, in 1875, thus epitomized Judge Breese, his career and his unique position in our state in a more graphic and compendious fashion than do either of these last quoted:

There is not a man in the State who knows so much of its early history as he does. No man living there has been so thoroughly identified with all its history; has been so much a part of it, and who at the Bar, in the Senate House and on the Bench has so long and so ably illustrated its annals. The reports of the Supreme Court attest his profound knowledge of the law, the vigor of his intellect, the ripeness of his scholarship, and the peculiar grace of his diction. No Judge who ever sat on the Bench could touch the very heart and soul of a law suit with more unerring certainty; and his opinions will live as long as the Jurisdiction of the State shall exist.

This tribute gains added weight when we remember that Mr. Washburne was always a Republican and a strong partisan. But he was also a just-minded and honest man.

It was said of Judge Breese that in appearance he was every inch a Judge.

“ Deep on his front engraven,
Deliberation sat and public care.
His very look drew audience and attention.”

But with all this dignity of demeanor, this majestic aspect, there was coupled a courtesy instantly felt, but altogether indescribable — a certain subtle essence of good breeding and refinement, which escapes if one seeks to confine it within the limits of expression.

Judge Scott thus described his personal appearance:

He was rather short in stature, being somewhat below the medium height, of stout build and had an unusually deep and large chest. He always dressed as became one in his position and always with the utmost care and neatness. Of a bronze complexion his features were bright and clear. Being near-sighted he always wore spectacles except when reading. Early in life he was always close shaven, and his hair, which was dark, cut very short. That style became him very much. Later in life he wore a long full beard, which was very heavy and suffered his hair, which was also rather heavy, to grow to a great length, falling down over his shoulders, giving to him a venerable appearance and perhaps causing him to look older than he really was.

"His voice," said Mr. Charles P. Johnson, "was by no means strong, nor did it vary much in intonation. His gesticulation was limited and moved along straight lines. His bearing was especially courtly and dignified. He spoke with fluency, was at times rhetorical and though not impassioned, he was persuasive, argumentative, logical and forcible."

Judge Breese was, quite naturally, much interested in the early history of Illinois; and in December, 1842, he delivered before the General Assembly an interesting address on that subject which was published after his death by Melville W. Fuller, Thomas Hoyne and Henry S. Monroe.

He died on the evening of June 27th, 1878, at Pinkneyville, Illinois. His death was sudden and quite unexpected. He was called at the height of his useful judicial activities, his intellectual powers

unimpaired, his faculties apparently untouched by time. He had lived a long life, filled with incident, rich in varied experience, marked by very considerable achievement and conspicuous success.

His distinguished biographer, the present Chief-Justice of the United States, from whose labors I have largely derived the materials for this sketch, in speaking of his long life, after referring to the growth and development of the country as he lived to see it, used this suggestive language: "When he entered Kaskaskia, Marshall and Story, and Brockholst Livingston were members of the Supreme Court of the United States. Kent was Chancellor, Gibson was entering upon his judicial career, Shaw and Taney were at the bar, Eldon was on the woolsack; Ellenborough had but just been succeeded by Abbot."

To this it may be added that when Judge Breese was born, men traveled substantially as they did when Rome was a republic and when the Pharaohs ruled. Their implements of agriculture and husbandry had not changed materially in 2000 years. Machinery was crude and of exceedingly limited application. Medicine and surgery except for the discovery of the circulation of the blood and the prophylactic value of vaccination, had made little or no substantial progress since the days of Galen and Hippocrates. Anesthesia was unknown, anti-septic methods in surgery were undreamed of, the germ theory of disease was undiscovered, microscopic examinations of the blood and tissues of the

body, and the thousand and one incidents of modern diagnosis were quite unheard of. The telegraph, the telephone and the countless applications of electrical energy to the uses of man were wholly unanticipated.

In all these things the world changed more in the seventy-eight years during which Sidney Breese lived than it had during the whole period of historic time which preceded his birth. In these respects the Nineteenth Century has left a heritage to the ages which it may be confidently asserted will never be equaled in any other similar period down "to the last syllable of recorded time."

So this was a wonderful time in which he lived and in which we live. The great political changes in our own land that came in the same period, resulting in the Civil War and the abolition of slavery, titanic as was this awful struggle, seem to lose size and proportion when we contemplate the wider and more universal changes to which I have referred.

While not one of the great leaders of his age, Judge Breese yet played an honorable and conspicuous part at a memorable period in our national growth and development. He was one of the founders of states in this great Empire of the West. He was one of the men who organized and administered government in a new and growing region of limitless possibilities; and he was one of the comparatively few who so far left his impress on his time, that without mention of him, its history is incomplete.

To the people of Illinois of the last generation,

Lincoln, Grant, probably Douglas, and possibly Logan were the most familiar figures—but after them, I believe that the appearance and the name of Sidney Breese were known to more people in this state than those of any other one of our sons. Among judges and lawyers he was, in this respect, easily our best known representative. It is fitting, therefore, that he should be remembered as a pioneer, lawyer and judge, who would perhaps be most generally nominated by our people on account of his close and conspicuous identification with the history and institutions of our state, as well as in recognition of his undoubted talents, for admission to a National Pantheon of the profession.

HENRY WOODHULL GREEN.

HENRY WOODHULL GREEN

From a painting in the Court of Errors and Appeals at Trenton,
New Jersey.



HENRY WOODHULL GREEN.

1804-1876.

BY

EDWARD QUINTON KEASBEY,

of the New Jersey Bar.

If any of the older members of the New Jersey bar were asked to name two or three of the judges of the olden time whose judicial work had made the deepest impression upon the law of the state, the name of Henry W. Green would surely be one of them, and almost always the first. The younger men who did not feel the impression of his strong personality, are conscious through tradition, of the influence that he exerted on the men of his own time; and if they have made a study in the reported cases of the development of the law, they know the strength and clearness of his judgments and are aware that the volumes that contain them are the most frequently referred to in the later decisions. He was Chief-Justice of the Supreme Court for fourteen years, and for six years he was Chancellor; and both in law and in equity, the judgments of Henry W. Green have stated with clearness and precision the principles which have been applied in the later cases under new conditions.

The period of his service on the bench was one in which the personality, the character and the motives of the leading mind in the court would have a great effect upon the adaptation of the old law to the conditions of modern life. He became Chief-Justice of the Supreme Court in 1846 and served for fourteen years until the beginning of the Civil War in 1860, and he served as Chancellor from March 15th, 1860, until May 1, 1866.

His work on the bench began after he had himself taken part in the making of the constitution of 1844 and in the revision of the statutes in 1845. The movement for doing away with the technicalities of the common law procedure took place in England and in this country while he was Chief-Justice of the Supreme Court. In New Jersey it took the form of "an act to simplify the proceedings of the courts of law." There was no abrupt transition, but an adaptation of old methods to new conditions. The Chief-Justice was well trained in the common law and had a profound respect for its precedents and principles, and at the same time he had a clear comprehension of the new conditions of modern business and it was largely because of this and of his strong sense of justice and directness of purpose, that the principles and practice of the law were adapted without break of continuity to the needs of the present time.

He was a man of commanding personality, dignified and impressive in appearance, of large build, over six feet in height, erect and vigorous. He had

a fine head and strong, regular features; clear blue eyes and long, reddish hair. With a keen powerful intellect, he had a strong will and a quick and impulsive temperament. In manner he was dignified and austere. He was prompt and decisive in action, serious and earnest in character. He was a man of intense energy and indefatigable industry, and he gave all his great powers of mind and character to the study of the law and the administration of justice under the law. He made a deep impression not only upon the men of his own time, but also upon the law and upon the administration of justice.

Henry W. Green was one of eight children of Caleb Smith Green and Elizabeth Van Cleve, his wife. One of his brothers, John C. Green, was a merchant in New York who was very successful in the China trade, and made large endowments for Princeton College and the Lawrenceville School. Another brother, Caleb Smith Green, was a good lawyer, and was for many years Judge of the Court of Errors and Appeals of New Jersey; and a third, George S. Green, was a lumber merchant in Trenton.

The family lived in Lawrence Township, between Trenton and Princeton. Both the Greens and the Van Cleves were among the early settlers of New Jersey. William Green left England in the latter part of the seventeenth century and landed in Philadelphia at the age of twenty. Wishing to return, however, he went to New York, and, finding no ship

about to sail, he visited the family of John Reeder in Long Island, and remained with them and afterwards married Joanna Reeder who also had come from England. They went to Ewing Township, near Trenton in New Jersey, about 1700, where he bought three hundred and forty-five acres of land from Daniel Coxe and built a brick house, the first to be erected in the Township.¹ The house is still standing. He was one of the first judges of the Court of Common Pleas of Hunterdon County and died in 1722, leaving six sons and four daughters. One of these sons was Richard, who married Mary daughter of George Ely of Trenton. Their second son, George, married Anna, daughter of the Reverend Caleb Smith, and settled on a farm in Lawrence Township. His oldest child was Caleb Smith Green, who was the father of Henry W. Green, and died in 1850, at the age of eighty.

Henry W. Green's mother was Elizabeth, daughter of Aaron Van Cleve. The Van Cleves also were an old New Jersey family of Dutch ancestry, descended from Hans and Engeltie Van Cleef, who came from Amsterdam to New Utrecht, Long Island, and Hans Van Cleef is mentioned as one of the patentees in the grant from Governor Dongan in 1686.

The Reverend Caleb Smith, Chancellor Green's paternal grandfather, was a Presbyterian minister at

¹ Genealogy of Early Settlers in Trenton and Ewing, by Reverend Doctor E. F. Cooley, p. 78.

Newark Hills, now called Orange Mountain, and his wife, Martha, the Chancellor's grandmother, was a daughter of the Reverend Jonathan Dickinson, also a Presbyterian minister and the first president of Princeton College. The Reverend Caleb Smith was the son of Colonel William Smith called Tangier Smith who was the first Chief-Justice of the Province of New York.

Henry Woodhull Green was born at Maidenhead, Lawrence Township, in Hunterdon, now Mercer County on September 20th, 1804. He was brought up on his father's farm and was taught at Lawrenceville Academy, under the Reverend Isaac V. Brown, a school, which has since been put on a permanent foundation by the endowment made by his brother, John C. Green. After some instruction by the Reverend John McLean, he entered the Junior class at Princeton College at the age of fourteen, and was graduated at sixteen. There were still five years before he could be admitted to the bar, but he took up at once the study of law.

There was no law school in New Jersey. The study of the law consisted in the reading of such old reports and treatises as could be found in the office of a lawyer who undertook to become the preceptor, and usually received an annual fee from his student. There was practice in drawing pleadings and there was experience in the preparation of evidence and the trial of cases before justices of the peace, and also in the examination of authorities, and the making of

briefs, for many of the cases in the practice of the best lawyers were begun and well fought in the justices' courts and most of the arguments in the Supreme Court were on *certiorari* to the decisions of the justices.

Mr. Green's preceptor was Charles Ewing, then a studious and learned lawyer in Trenton, who was made Chief-Justice in 1824. Mr. Ewing had himself studied law under Samuel Leake, a very precise and methodical lawyer learned in the black letter cases, and he was therefore by training as well as by temperament a strict common law lawyer and inclined to stand upon the old ways. Profoundly learned in the common law, and at the same time a diligent reader of works on civil and ecclesiastical law and well versed in general literature, Mr. Ewing was a man of great industry and thoroughness in the preparation of his cases, and had the reputation of being the greatest lawyer of his time in the state of New Jersey. The influence of such a man upon a young man like Henry W. Green must have been very great.

Little is known of his student life, but the tradition is,—and it may be inferred from his character in later life,—that he was sedate, sober and serious, and an enthusiastic student, and that he loved to delve into old law books in working out the abstruse questions which Mr. Ewing found in the cases that arose in his practice. It was no doubt in his training under Mr. Ewing that Mr. Green acquired the habits

of research which he always followed both as a lawyer and as a judge and that it was from him that he learned to seek for the sources of legal principles and acquired his respect for precedent and the beginnings, at least, of his thorough knowledge of the principles of the common law.

Mr. Ewing was made chief-justice of the Supreme Court in 1824 and Green, then twenty years of age, went to the Law School at Litchfield, Connecticut. Here he studied for seven months under Judge Tapping Reeve and Judge James Gould whose sister was the wife of Aaron Burr, and then returned to Trenton and continued his studies in the office of Garret D. Wall, until he was admitted to practice as an attorney at the November term, 1825. The license to practice as an attorney did not then, nor does it now, constitute an admission to the bar of the Supreme Court. The counsellor's license cannot be had until after three years of practice as attorney and a further examination. Mr. Green became a counsellor at the February term, 1829, and within a year we begin to find his name in the reports of cases in the Supreme Court. These early cases were *certiorari*s to the proceedings of the justices' courts or writs of mandamus to the common pleas. Such cases occupied much of the attention of the court in those days, and called forth the best efforts of counsel. It was, no doubt, before the justices of the peace that Green first won his reputation as a forcible and persuasive advocate and in the argument of these same *certiorari*-

ris he made himself a reputation for thoroughness and pertinacity as well as for power of forcible statement. It is said that he never lost sight of any point and that on a *certiorari* he would present and argue fifteen points when the last one was conclusive and the rest were not at all tenable.

The contentious business of the courts in these days came rather from the country than the cities, and the courthouses of the large agricultural counties were the fighting grounds of the most ambitious advocates. For a good many years after he came to the bar, Trenton was the county seat of the large county of Hunterdon, from which the county of Mercer was set off in 1838, and Mr. Green was much engaged in the trial of jury cases in Hunterdon and Burlington counties as well as in the county of Mercer.

The field was a good one, and Mr. Green was a hard fighter. He was intensely in earnest and an indefatigable worker. He knew his cases thoroughly and tried them well. With what has been described as impressive and fluent diction he was a persuasive, forcible and eloquent speaker and made a great impression upon the jury. Jury trials lead to arguments in the Supreme Court, but distinction there depends upon other qualities. For this work also he was well equipped by conscientious study of the law and by great mental power and unlimited capacity for hard work. He knew how to trace the law to its sources, so far as they were then accessible. He had a strong grasp of legal principles and the

power of reasoning upon them and presenting them clearly and forcibly and he had moreover a strong will, a commanding presence and great personal force. He soon became one of the leading members of the bar in cases before the Supreme Court and the Court of Chancery and was retained in many important cases. His name appears with increasing frequency in the reports both of law and equity, and he was recognized by the courts as one of the strong men at the bar; by the profession as a formidable opponent; and by the people as a safe adviser and a powerful advocate.

In 1832 he was elected Recorder of the city of Trenton and in 1837 he was appointed reporter of the Court of Chancery and served for seven years. He not only reported the cases decided during his term, but also collected and reported the opinions of Chancellor Vroom from 1834 to 1836, and two of his opinions in the Prerogative Court in 1831 and 1832. Mr. Green's reports consist of three volumes. The first contain the opinions of Chancellor Pennington, from January, 1838, to October, 1841, inclusive. The second, the opinions of Chancellor Vroom, from his return to office in 1833 until the close of his official labors in 1836, and the third, the decisions of Chancellor Pennington in 1837 and in 1842 and 1843, and Chancellor Haines in 1844 and 1845. These were the last of the Chancellors under the old constitution who held the office by virtue of their authority as Governor. Mr. Green's first volume is the second

volume of the equity reports of New Jersey, and it is the first that was furnished with an index. The head-notes were prepared by the reporter and they are remarkable for clearness and precision of statement. The index is analytical as well as alphabetical. The service he rendered as reporter was valuable in setting the standard for the equity reports of New Jersey and it was of still greater significance in its effect upon a mind like his in preparing him for his duties as Chancellor.

During his twenty-one years at the bar, Mr. Green devoted his energies almost entirely to the work of his profession. Distinction at the bar led naturally in those days into political life. Mr. Green showed little desire for political honors, holding no office that was not connected with the courts. In 1842 he was elected as a member of the Assembly on the Whig ticket from Mercer County, but it is said by one who knew him that the position was not agreeable to him; that the mold and bent of his character were to lead and to rule, and that he was unwilling to yield to the judgment of the party or the caucus.² However that may be, he served only one term in the legislature and his only other appearance in political life except in the convention to revise the constitution, was as a delegate to the National Whig Convention held in Baltimore, in 1844. He was chosen to make the speech by which Theodore Frelinghuysen was nominated as Vice-President. His

² Jacob Weart, *New Jersey Law Journal*, vol. XXII, 45.

speech is said to have been a very strong one, and by his personality as well as by his speech, he made a great impression upon the delegates. It is related that one of the Virginia delegates shortly afterwards asked a visitor from New Jersey whether they had any more such men in New Jersey.

In the same year he was elected one of the three delegates from Mercer County to the Convention called to revise the constitution of New Jersey. The old constitution had been framed hastily by the Provincial Congress in 1776, before the Declaration of Independence, and a revision was considered necessary in order to adapt it to the present conditions. While he was a member of the Legislature, he was chairman of the committee to which the question of calling the constitutional convention had been referred, and he signed, and no doubt wrote, the report of the committee which was adverse to the calling of the convention.³

The record of the proceedings of the convention does not contain the debates, and his name appears but seldom in the newspaper reports of the debates.⁴ But Mr. John Whitehead, a young lawyer at that time, says "Henry W. Green exercised a masterful influence in the constitutional convention and aided materially in directing and molding its deliberations.⁵ He served on the Committee on the Judi-

³ Pamphlet, Sherman & Barron; Trenton, 1843.

⁴ Newark Daily Advertiser, May 15th-June 27th, 1844.

⁵ The Supreme Court of New Jersey, by John Whitehead, Green Bag, vol. III, 457.

ciary and was afterwards appointed on the special committee to arrange and unite the reports of the several committees. In the absence of a report of the debates, Mr. Green's opinions may best be gathered from the votes and it appears that on many of the important contested questions his views were those of the majority which were adopted. He voted, however, for the appointment of the judges by the legislature in joint meeting instead of by the Governor with the advice and consent of the senate and he voted in favor of an amendment providing that the judges should hold office during good behavior instead of for a term of years.

In 1845 he was appointed with Peter D. Vroom and Stacy G. Potts on the commission to prepare a revision of the Statutes. The revisers made a thorough revision. They rearranged the statutes by an analysis that was abstract and logical, but the bar was familiar with the convenient groupings of the compilations made by Judge Elmer in his Digest in 1838, and when a new edition of Elmer's Digest was prepared by Judge Nixon in 1855, the bar made use of that rather than of the revision and the next revision, prepared in 1874, was made on the lines of the old digest.

The constitution of 1844 provided for the appointment of a chancellor. It was the wish and expectation of the bar in the southern and western parts of the state that Henry W. Green should be the first chancellor under the new constitution, but there

were influences in the eastern and northern sections of the state in favor of Oliver S. Halstead of Newark and he received the appointment. The next year, the term of Joseph C. Hornblower of Newark, as chief-justice expired, and on November 2d, 1846, Governor Stratton appointed Henry W. Green, Chief-Justice of the Supreme Court.

He was recognized as one of the greatest and strongest members of the bar, and his appointment as chief-justice was received with general satisfaction.

He took his seat at the January term, 1847. The Associates of the Chief-Justice were all men of ability and industry, and some of them very learned in the law, but the Chief-Justice through all the fourteen years of his service was the dominating personality and the man that exercised the greatest influence on the decisions of causes and the development of the law.

He was well equipped by the study of the law and in the courts. He came on the bench in the prime of life, at the age of forty-two, full of energy and zeal. He had devoted himself for twenty-seven years to the study and practice of the law, giving all the power of his mind and will to the work of his profession. He had an intellect that was easily capable of dealing with the questions that came before him and he delighted in using it. Strong and self-reliant, he was conscious of his own powers and feeling the responsibility of his position he did not hesitate to exercise

it. He took full share and more than his share of the work of the court and his full share of the responsibility for the decisions.

It was at the circuits that he made at first the strongest impression. His manner was very dignified and impressive. His tall form and strong frame, his massive head, stern features and—though one might imagine otherwise—even his long and rather shaggy reddish hair gave him an air of command and judicial dignity.

He did not require the sheriff to call at his lodgings with a coach and four, but when he walked from the hotel to the courthouse, he was always preceded and followed by four constables, carrying their staves of office. In the courtroom he was strict with witnesses and jurors and required the utmost decorum. Tardiness on the part of a juror, however important a man he might be in the community, brought down a severe rebuke or incurred the payment of a fine. It has been said of him that upon the bench he was "a man of such commanding dignity that one being present in a court where he presided, would feel that the power and sovereignty of the state were present in its full force."⁶ and this impression was strongest on "the judgment days" on which he used to pronounce sentence upon all those who had been convicted during the term. One who was present tells of the effect it had on a client of his, an Englishman, who chanced to come in one day and said: "My

⁶ Jacob Weart, *New Jersey Law Journal*, vol. XXII, 45

heyes! what sort of a man is that? 'is words come out like red 'ot hiron."

Mr. John Whitehead, who was a young man at the bar of the Essex Circuit when the Chief-Justice presided there, in writing of him refers to his remarkable and dignified appearance, and says: "He rarely unbent himself from his dignity and reserve, except with a few favored intimates," and again, "His manners were austere and to many were forbidding in their austerity. He was, it is said a moody man, at times genial and affable, and at others repellant and severe."⁷

In the trial of a cause he took command and directed and controlled counsel and it was not easy for them to stand up against him and try their cases in their own way. It was a hard school for counsel, but there were some strong ones at the circuits at that time, and a struggle with the judge was a part of the game. His vigorous, impulsive words and manner sometimes appeared to be discourteous and by some pretty vigorous members of the Essex bar they were called domineering and dictatorial. There was one in particular who resented it publicly and in summing up a case he turned directly to the jury and said he knew it was the custom to address the court first, but that he proposed to speak only to them. He then spoke in unmeasured terms of the conduct of a court which should arrogate dictatorial powers and interfere with the rights of the people in the trial of

⁷ The Supreme Court of New Jersey, Green Bag, vol. III, 457.

causes before juries of their peers. It is said that he referred to an opinion of Lord Mansfield's and exclaimed: "Ah, Gentlemen, *there* was a Chief-Judge whose conduct was entitled to respect!" Chief-Judge Green appeared to be startled and aroused and seizing his pen wrote rapidly during all of the counsel's address and then in his charge to the jury made a scathing description and denunciation of the demagogue.

The friction between these two continued so long as the Chief-Judge remained at the Essex Circuit and it is said that he felt that he was unpopular there and he afterward told Chancellor Magie that it was not due to his want of kindly feeling towards the bar, but to his Irish blood and red hair.⁸ He was impulsive and was some times hasty in rebuking counsel but he was warm hearted and just, and was quick to apologize when he found that he had been wrong, and is remembered at the Essex Circuit with affection as well as respect by men still practicing there whose first legal battles were fought under him as a stern umpire on the bench.

In charging the jury the Chief-Judge took the responsibility of the whole case upon himself and while leaving the issue of fact to them he impressed his own opinion upon them so forcibly as to control the decision whenever a wrong verdict on the facts

⁸ Address of Vice Chancellor James Bergen before the New Jersey State Bar Association, 1905. New Jersey Bar Association Year Book, 1904-1905.

would result in what he regarded as a perversion of the law. In the trial of a woman for murder in his early days in Essex County, it appeared that she had gone out and stabbed her lover in a fit of jealous rage, and Mr. Cortlandt Parker for the defence had brought out in his opening, all the story of her provocation and suggested that in her grief her mind was unhinged, and that the killing was done in a moment of insanity. Popular feeling in her favor was intense and the courtroom was crowded. The Chief-Judge in his charge stated the law with all the great force at his command, but the jury remained out all night and came in early on Sunday morning, and asked if, under the evidence they could not convict of manslaughter. The Chief-Judge said: "It is my duty to tell you that you have a right to bring in a verdict of manslaughter, but I tell you also that under this evidence you might just as well find the defendant guilty of horse stealing." The woman was acquitted.

Mr. Cortlandt Parker in an address on the organization of the Essex County Bar Association, in 1874, said:⁹

Those who did not know Henry W. Green as a Circuit Judge, missed seeing an eminent illustration of judicial majesty. His great ability was certainly never excelled in New Jersey, and even less conspicuous than his stern, yet gracious manner in exercising his high office. He sat patient, untiring, admitting evidence with great liberality, and hearing and adjudicating all

⁹ Pamphlet in New Jersey Historical Society Library.

points with rare impartiality through the course of the trial. But when he came to charge the jury, he was so sweeping in supporting the side he thought right, that counsel on both sides were half ashamed; the successful advocate, because his own effort appeared by comparison, so worthless; the unsuccessful one, because his seemed weak and needless. He was that rare achievement, a great Judge.

A fine example of the manner of the Chief-Judge in dealing with a jury trial involving an important legal principle is preserved in his charge in the case of Trumbull vs. Gibbons, tried in the Essex Circuit at the April term, 1849.¹⁰ It was an action of ejectment by the heirs at law of Thomas Gibbons against his son, William Gibbons, the devisee under his will. The testator had large estates in New Jersey, Virginia and Georgia. According to the testimony of Mr. David B. Ogden, "Thomas Gibbons was a man of very strong mind, of very strong passions, of very strong prejudices, and very strong self-will. There was evidence in the case of violent resentment on his part against his son-in-law, John M. Trumbull, because of his remonstrance against his outrageous conduct in the family, and there were documents in the case which, the Chief-Judge said, "certainly exhibit a painful, humiliating, mortifying spectacle of human depravity such that it would seem well-nigh incredible that the author of those productions could be sane." Thomas Gibbons' will gave substantially all his property to his son William, on condition,

¹⁰ 2 Zabriskie's Reports, 117.

expressed in the strongest terms, that no part of it should ever go directly or indirectly to his son-in-law, John M. Trumbull, or any of his descendants to the remotest generation. It was insisted that the will was immoral and void for injustice and that it was the result of undue influence and the work of a perverted and insane mind.

The Chief-Judge made a masterly review of the facts and a clear statement of the negative and the positive tests of testamentary capacity and the rules he laid down have been quoted and adopted in the reports and text books ever since. He showed that the passionate exhibition of resentment against his son-in-law, however unjust, was the result of the headlong fury of the testator's character and not evidence of mania or of undue influence, but only the expression of strong, long-continued passions and prejudices and that the harsh and unreasonable condition of the will, whether it were valid or not, could not affect the validity of the devise.

The closing passage of the charge may well be quoted as an example of the power of the Chief-Judge in directing the mind from irrelevant and yet persuasive considerations to the very point at issue under the law and also as a fine specimen of good English and of simple and forcible diction.

I need not say to an intelligent and reflecting jury, that the validity of this will can in no wise depend upon the virtues or vices of the testator. If this will be invalid, no virtue of the testator can sustain it, if valid, no vices of the testator can impair

it. Much less can the validity of this will depend upon the consistency of its provisions with our ideas of fairness or propriety, or even with the principles of justice and humanity; such a test of its validity would be certainly subversive of that absolute control and dominion which the law gives to every man over his own property. The question for your decision is not, is this a fair will, a just will, an equitable will, the will of a right thinking man and a kind hearted father, but is it Thomas Gibbons' will? If it is, your verdict should be for the defendant. Nor need I say to you, that this is not the place nor the occasion for the indulgence of our sympathy with misfortune, or our indignation against vice, much less are you here to rebuke sin. We are here in the discharge of a high and sacred duty, which is to be performed with a single eye to the law and the testimony, irrespective of our feelings and our sympathies.

The Chief-Justice held the Essex Circuit from November, 1846, until February, 1853, holding other circuits at the same time. In 1853 he took the Mercer Circuit and other circuits near his home in Trenton.

The legal influence of a justice of the Supreme Court in New Jersey depends much upon his conduct of trials at the circuit as well as upon his opinions upon arguments at the bar of the Supreme Court. He is a member of the Supreme Court in the trials of cases at *nisi prius*. His influence there over the minds of the people and of the bar, is greater than when he is sitting in the court at Trenton. The impression that he gives of the dignity of the court and the supremacy of the law is felt throughout the community. The standards set by Chief-Justice Green were high and their effect has been wide and lasting.

It was his personality that made the impression at the circuits, and the effect of it has been handed down by tradition and example. It is on the bench of the Supreme Court and in the Court of Chancery that he had the most influence upon the development of the law itself and what this was may be known not only by tradition, but also by a study of his opinions and of the deference paid to them as authority in later cases and other jurisdictions.

Some of these opinions will be referred to in detail at the close of this paper.

As chief-justice on the bench of the Supreme Court in Trenton he assumed the responsibility of his position and with courtesy and deference to his associates, he yet made it apparent that he was the head of the court. This impression was due to some extent to his dignified presence and manner but a man of his intellect and force could not help taking the lead in a position of responsibility. He had a high idea of the dignity of the law and of the courts and of the importance of administering justice under the law, a strong sense of the authority of the law and the necessity of maintaining it. He was intensely in earnest and gave the whole force of his mind and will to the duties of his office and the right decision of the cases that came before the court. His intellect was clear, vigorous and alert and he used his great mental power with the energy of an ardent temperament. He had a clear understanding of the principles of the common law and the power of rea-

soning upon them and applying them to the facts of the case. His mind grasped the facts easily and saw clearly the real question and he set himself to solving it in the most direct method without sparing research, and having found the rule, he applied it with directness, clearness and force.

He was thorough in his investigation and followed up every question until he had exhausted it and having reached his conclusions, he stated them and referred briefly to the authorities that were directly in point so clearly that the question seemed to be put at rest. His power of clear analysis appears in the orderly arrangement of the subject under discussion, and his conclusions were expressed in simple and well chosen words with great force and directness.

He had been brought up in the study of the common law, and had a profound respect for its authority and while he sought to do justice in the particular case and to do it in a practical way, yet he did not permit himself or the court to depart from well established principles and was careful to maintain the law in its continuity while adapting it with good sense and sound judgment to new conditions.

Judge Green served as chief-justice for two terms of seven years each. At the end of his first term, the Governor, who had the appointing power, was a Democrat, and he offered the position to ex-Governor Peter D. Vroom, who peremptorily declined, and then to Alexander Wurz, who also declined, and then Judge Green was reappointed, and it is said

that these declinations were anticipated, and that the Governor and some others of the Democratic party were quite willing to have a fair excuse for reappointing the Chief-Justice, who had given great satisfaction as the head of the Supreme Court.¹¹

His second term expired in November, 1860, but in March, 1860, he was appointed Chancellor. The office had been vacant nearly a year. Chancellor Williamson's term expired on February 6, 1859, and the Democratic senate was determined to have Chancellor Williams reappointed. Governor Newell, the first Republican Governor, nominated Abraham O. Zabriskie and the Senate rejected him. The Governor nominated Zabriskie again and he was again rejected. This was repeated several times during the session, and on the last day, the Governor sent in the names of Abraham O. Zabriskie, Asa Whitehead, George H. Brown, Richard S. Field, Abraham Browning, Joseph F. Randolph, Joseph P. Bradley, Cortlandt Parker and Frederick T. Frelinghuysen, and asked the Senate to make a selection, but the Senate said the Governor had not the right to send in such a "batch of names." Thereupon the Governor nominated George H. Brown, but the senate rejected him and adjourned and the state was without a Chancellor until the next session of the legislature, the vacancy not having "happened during the recess,"¹² and on March 15, 1860, Governor Olden nominated

¹¹ Lucius Q. C. Elmer, *Reminiscences*, p. 189.

¹² See *New Jersey Law Journal*, vol. II, 136; *Ibid*, vol. XI, 122, 134.

Chief-Justice Green and the nomination was promptly confirmed.

He took his seat at a special term in March of that year. As Chancellor he had no associates. The Court of Chancery then consisted actually as it does now legally, of a Chancellor, and there were no Vice-Chancellors to share the work with him. He was also the Ordinary, or Judge of the Prerogative Court with original and appellate jurisdiction over wills and administrations. As chief-justice he had been a member of the court of Errors and Appeals and had had experience in the decision of equity cases. It is this curious anomaly by which the common law judges hear appeals in equity that has tended to broaden their views and to keep them familiar with equity principles while yet keeping the administration of the two systems distinct.

Chief-Justice Green was brought up in the straightest sect of common law lawyers. He had studied out and mastered the principles of the common law; his mind delighted in the logic by which they were worked out and applied, but with his strong sense of justice and practical knowledge of affairs he adapted the principles of the common law to new conditions and when he came to deal with questions of equity he did so with the same thoroughness of research and the same accuracy of reasoning, and the equity system as worked out and applied by him in New Jersey was based upon the precedents and established principles of the English Chancery and

the best equity judges in this country. His mind seemed to delight even more in the reasoning and the results of equity jurisprudence than in those of the common law, and it is as chancellor more than as chief-justice that he has influenced the development of the law in New Jersey. It was perhaps the common law training of a mind so strong and so self-reliant as his that brought it about that his decisions as chancellor worked out the system of equity as a logical system based upon precedents. Without it, the decisions might have been just but they would not have rested so firmly upon established principles or have formed so safe a basis of authority for the guidance of his successors. At the peculiar stage of the development of the law which he occupied, it was the definite statement of principles and the orderly working out of the system of equity jurisprudence that was of the greatest value. Chancellor Green was not a judge brought up in the atmosphere of equity jurisprudence who asked himself first of all, "What is the equity of this case?" But it is because of his work in examining and stating the principles that his successors are enabled to determine a case by asking and answering that question. His opinions as chancellor are contained in five volumes of the New Jersey Equity Reports, the 2d volume of Beasley's Reports, 1st and 2d McCarter's Reports, and 1st and 2d C. E. Green's Reports. They cover a wide range of subjects and in the course of his service, the Chancellor considered nearly every

subject of equitable jurisdiction. He made his examination so thoroughly and stated the results so clearly, that his opinions have been of great value to the profession and even his *dicta* have been accepted as authoritative and they have been quoted in subsequent decisions, sometimes without sufficient examination into the sources. But the *dicta* were generally right, and there were few that were *obiter*. He saw clearly the point of a case, and his discussions of facts and legal principles were clear and direct. On questions of law, he stated the propositions clearly as he understood them, and referred to the authorities that were directly in point and more rarely he traced the development of a principle down through the successive cases. His opinions were usually short, though there are some long examinations of complicated facts, and some long and exhaustive discussions of difficult questions of law, which the Chancellor was determined to get to the bottom of. The excellence of a Chancellor depends on something more than his knowledge of equity principles, and his power to get at the truth from the depositions of witnesses. The office requires administrative faculties, sound judgment and a strong practical sense of justice and in these also, Chancellor Green was equal to the task.

Being the man that he was, with his mental ability and force of character, his experience as chief-justice and as chancellor would have fitted him well for the duties of a chief-justice of the Supreme

Court of the United States, and this honor was tendered to him by Mr. Lincoln on the death of Chief-Justice Taney. The fact is not generally known, but it is vouched for by the late Charles Ewing Green, who was shown the telegram from the Secretary of State by which the tender was made. This was at the end of 1864, and the Chancellor's strength had already begun to fail, and he felt unable to assume new duties and great responsibilities.

The active work of Henry W. Green as chancellor covered a period of less than six years. It began in March, 1860, and in the autumn of 1865, failing health compelled him to give up the hearing of important cases and he was obliged to ask for the assistance of Masters in Chancery in hearing causes for him. In the Chancery reports for the October term, 1865, there are only two opinions by the Chancellor. The rest are for the most part by James Wilson, Master, and there is one by Chief-Justice Beasley, sitting as Master, and in the February term, 1866, the opinions are by the Chief-Justice, and by Abraham O. Zabriskie, James Wilson, Thomas P. Carpenter and Jacob Weart, Masters. In March, 1866, an act of the Legislature was passed providing for compensation to be paid by the State to Masters sitting for the Chancellor, but it is characteristic of Mr. Green that he insisted on paying the fees himself. Mr. Weart in his sketch of his life¹³ quotes two letters from the Chancellor on this subject, and

¹³ New Jersey Law Journal, vol. XXII, 70.

says that one of the marked characteristics of the Chancellor was his great regard for the welfare of the people and the economical administration of justice. He adds:

Here we have a man worn out in the service of the state who, when others were called in to aid him, for whose labors the state had made ample provision, refused to allow the state to make the payment, and insisted that the same should come out of his salary.

On the first of May, 1866, the Chancellor resigned his office. He had broken down from over work and could do no more. He had worked with intensity of energy and gave himself little rest and hardly any recreation, and the strain was too severe. He went on working up to the limit of his strength and when he stopped it was too late for relaxation to restore his powers. He tried the effect of a sea voyage and a visit to Europe, but returned home five months later unimproved in health. He returned to the house which he had built for himself in 1855. It was alongside of the State House where he had sat as chief-justice and as chancellor for twenty years and there, after his work on the bench was done, he lived for ten years, unable to take his part in the life of those courts to which his own life had been devoted. He kept himself informed of public affairs and was glad to see his old friends who called upon him. He kept in mind the cases which he had decided and as an instance of this, Mr. Cortlandt Parker tells of calling on him with Mr. George M. Robeson, some years after he had left the bench, and

asking for his notes of a trial, and the Chancellor went to a shelf in his library and at once put his hand upon the papers in the case and produced his notes and they were used in the hearing of the case on a writ of error. In 1867 he was appointed a member of a legislative commission to revise the tax laws. The men with him on this committee, were the former Governor Charles S. Olden, Peter S. Duryee, William Paterson and Amzi Dodd. A thorough report was submitted January 23d, 1868, and it was accompanied by a draft of a bill revising the whole system of taxation. In July, 1868, Chancellor Green contributed to the Princeton Review a critical paper on the trial of the Reverend William Tennant for perjury in 1741. It required a careful examination of old court records and a critical review of testimony and of historical evidence and completely disposed of the traditional story of the deliverance of the Reverend defendant "from conviction by the testimony of a witness whose attendance was induced by the influence of a dream."

Such strength as the Chancellor had for business was given to the affairs of the Presbyterian Church of which he was an elder and to his duties as one of the commissioners of the Sinking Fund of Trenton, and also to the affairs of Princeton College of which he had been a trustee since 1850, and the Princeton Theological Seminary of which he became a member in 1833 and the President of the Board of Trustees in 1859. He retained his position as vice-

president of the New Jersey Historical Society in which he had always taken a great interest, and in 1875 he was elected president, but resigned in the spring of 1876. He had the devoted care of his wife and children and the kind attention of his friends, but his delight in his labor had been so intense, that the inactivity of these years was very irksome, and to stand aside and see others doing his work, was hard for one who had so long been a dominating force at the bar and on the bench. His health grew worse toward the close of 1876, and he submitted to a surgical operation on December 18th, and died on December 19th, in the seventy-third year of his age. His wife and two children survived him.¹⁴

There is an incident of his life as chief-justice which he related to the present Chancellor of New Jersey, William J. Magie. When he was presiding in the Mercer County Oyer Terminer, a man was tried before him for some very heinous offence and

¹⁴ He was twice married and both his wives were daughters of Chief-Justice Charles Ewing under whom he had studied law. He married first Emily Augusta Ewing, March 22d, 1831, and she died in 1837, leaving a daughter, Emily, who married William B. Blackwell, a lawyer of New York, and had a son named William B. Blackwell. His second wife, Susan Mary Ewing, he married January 2d, 1840, and by her Mr. Green had five children that died in infancy and also a son, Charles Ewing Green who was a lawyer of distinction and became reporter to the Court of Chancery in 1863 when his father was Chancellor, and held the office until 1877, having edited twelve volumes of the reports, volumes 16 to 27 New Jersey Equity Reports. He was also, like his father, a trustee of Princeton College, and was the President of the John C. Green Foundation of the Lawrenceville School in which his father was educated. A son of Charles Ewing Green bears the name of his grandfather, and is a lawyer in Trenton.

on his conviction, the Chief-Justice thought it his duty to impose a severe penalty, and sentenced him to the State prison for seven years. After the sentence was pronounced, the prisoner seizing an ink-stand, hurled it at the Chief-Justice and barely missed him. The Chief-Justice considered this a contempt of court, and immediately vacated the sentence and imposed another for the term of ten years, whereupon the prisoner said: "By God, when I get out of State's prison, I promise you that the first thing I shall do will be to take your life!"

About seven or eight years afterwards, when the Chief-Justice was walking one morning in his garden he saw within ten feet of him this same prisoner. He thought his end had come, but he walked on and met the former convict, who, instead of killing him, told him that he was very sorry for what he had done, and that he had been converted while in prison. This, the Chief-Justice said, very greatly affected him, and he invited him to come into his house; they sat down and he talked and prayed with him. He helped and encouraged him in many ways, but it was impossible for the man to get any work, and within a few months he was again convicted of some crime, and was again sent to prison, but not by Chief-Justice Green. However, after serving his term in State's prison, he came again to the Chief-Justice and thanked him for what he had done for him.

Judge Green's opinions as chief-justice of the Supreme Court are contained in the four volumes of

Zabriskie's reports and the first four volumes of Dutcher's Reports.¹⁵

At the July, 1847, term, the Chief-Justice took part in the first stage of the afterwards famous case of Gough vs. Bell,¹⁶ relating to the rights of owners of lands on the shores of tidal waters. He concurred in the opinion of Justice Randolph in which it was held that in New Jersey and under the common law, the title to the land between high and low water mark was not in the riparian owner, but in the state. All evidence of a grant by the state to the defendant having been excluded by the Court below, a new trial was granted. The case was tried again at the Hudson Circuit, in 1848, before the Chief-Justice, and a special case having been stated for the consideration of the court in banc the case was fully argued again by eminent counsel and the Chief-Justice wrote the opinion (Justice Randolph dissenting) and it is interesting to see how he reconciled existing conditions with the legal theories which were then accepted.¹⁷ He accepted it as the settled rule of the English common law that the title to the soil between high and low water mark belonged to the sovereign; that this right had not been conveyed to the Proprietors of New Jersey, but belonged to the state and could be conveyed by the state to one who did not own the upland, but the plaintiff who owned the

¹⁵ 21-28 New Jersey Law Reports.

¹⁶ 1 Zabriskie's Reports, 156.

¹⁷ Gough vs. Bell, 2 Zabriskie's Reports, 441.

upland had built a wharf out to low water mark, and the Chief-Justice maintained his right to hold that wharf against a subsequent grantee from the state. He found that there was a long established custom in New Jersey by which riparian owners were permitted to appropriate the land between high and low water mark for wharves and for fisheries, and he said:

The custom of making such appropriation, long enjoyed and generally acquiesced in, constitutes a local common law which this court will recognize and which it would be alike unsafe and unwise to disregard.

Later cases have asserted even more emphatically the title of the state to the land under water and have declared that it may be granted to a stranger without compensation to the riparian owner,¹⁸ and it is this decision of Chief-Justice Green's that has saved to riparian owners the right to their wharves built before the passage of statutes providing for the grants of land under water, and it is a curious fact that it is by this local custom in New Jersay that, so far as old wharves at least are concerned, the law is similar to that of England at the present day where the wharf owner cannot be cut off without compensation from access to the water.¹⁹

The theory that the state had a private and com-

¹⁸ Stevens vs. Paterson & Newark R. R. Co., 5 Vroom's Reports, 532.

¹⁹ Lyons vs. Fishmonger's Co., Law Reports, 1 Appeal Cases, 662; Attorney-General vs. Wemyss, Law Reports, 13 Appeal Cases, 192; Metropolitan Board of Works vs. McCarthy, Law Reports, 7 House of Lords Cases, 243.

mercial title in the lands under water was prevalent at the time the Colonists left England, but subsequent investigation shows that it was based on claims of the Stuart kings which were not recognized in earlier times, and Chief-Justice Green while accepting the prevalent view of the law of England, yet recognized the conditions which constituted a local law in New Jersey which is in fact in accord with the earlier and the later law of England.²⁰ The decision of Chief-Justice Green in *Gough vs. Bell* was affirmed by the Court of Errors with some difference of opinion in *Bell vs. Gough*,²¹ and Chief-Justice Beasley in *Stevens vs. Paterson and Newark Railroad Co.*,²² said that the final decision in *Bell vs. Gough* was a concurrence in the views expressed by Chief-Justice Green in his opinion in the Supreme Court and that "the true doctrine with respect to this local custom is embodied in the opinion read in the Supreme Court by Chief-Justice Green." The opinion has been quoted in all the subsequent cases on the rights of riparian owners, and it had an important bearing upon the question in a recent case of the right of a wharf owner to an injunction against the pollution of a tidal river by sewage.²³

²⁰ See, Moore's History and Law of the Shore and Fore-shore. Compare, Hall, On the Fore-shore, and Sergeant Meriwether's argument in *Dickens vs. Shaw*, in the Appendix referred to in an article on Tide-Flowed Lands and Riparian Rights in the United States, by R. Tillinghast, Harvard Law Review, vol. XVIII, 341.

²¹ 3 Zabriskie's Reports, 624.

²² 34 New Jersey Law Reports, 532.

²³ *Sayre vs. Newark*, 60 New Jersey Equity Reports, 361; also, 48 Lawyers' Reports Annotated, 722.

The rule established in *Gough vs. Bell* was stated again by Chief-Justice Green in *O'Neill vs. Annett*,²⁴ where he said:

The judges, it is true, differed as to the foundation and nature of the right of the shore owner, but all agreed that when the land was reclaimed or the wharf erected by the tacit or express consent of the legislature, it became private property and divested of its public character.²⁵

One of the most important and interesting cases which he decided as chief-justice, came before him for the first time in the October term, 1847, and again at the April term, 1849. It arose out of the destruction of property by the Mayor of New York during the great fire of 1835. The Mayor and two of the Aldermen in order to stay the conflagration, ordered buildings Nos. 46 and 48 Exchange Place to be blown up with gunpowder, and the goods of the plaintiff were destroyed and the action for damages was brought in New Jersey. Vice-Chancellor Bergen, in the address which we have above referred to,²⁶ said:

The Chief-Justice had strongly settled convictions and succeeded in having them prevail over the mere technical view of his brethren.

He held: That a statute authorizing the destruction of private property for public use, without providing for compensation would be unconstitutional, but that the right to destroy property to prevent the spread of fire rested on other grounds. It was not a tak-

²⁴ 3 Butcher's Reports, 290, 293.

²⁵ This was quoted with approval in, *Sayre vs. Newark*, 60 New Jersey Equity, 361.

²⁶ New Jersey Bar Association Year Book, 1904-1905, p. 39.

ing for public use, but was a natural right, existing independently of government, founded upon a law of necessity which justifies the exclusive appropriation of a plank in shipwreck, though the life of another be sacrificed; that the statute conferred no new right but converted what was a right of necessity into a legal right.²⁷

The decision was reversed by the Court of Errors on the ground that it was the statute that was pleaded as a justification and that the statute made no provision for the destruction of personal property and provided no compensation for it. The doctrine of necessity announced by the Chief-Justice was recognized, but it was said by the Court that the necessity must, not only be alleged, but proved before a jury.²⁸

There were thirty-three cases in all. The next time they came before the Supreme Court, was on a motion to allow new pleadings which had been put in after judgment for the defendant on demurrer had been affirmed by the Court of Errors.²⁹ The Chief-Justice on this motion discussed the effect of judgment on demurrer after affirmance and the meaning and effect of the stipulation of counsel. In the amended pleadings, drawn by Chancellor Williamson, the defendant relied again upon the statute, but alleged the necessity of destroying the personal property with the buildings. The Chief-Justice again maintained the doctrine of necessity and declared that the Court of Errors had not decided that the statute

²⁷ American Print Works vs. Lawrence, 1 Zabriskie's Reports, 248.

²⁸ Hale vs. Lawrence, 1 Zabriskie's Reports, 714.

²⁹ Hale vs. Lawrence, 2 Zabriskie's Reports, 72.

was void, but only that the necessity had not been alleged and he held that since the statute had been declared good by the Courts of New York and the necessity of destroying the personal property had been alleged the statute was a justification. Justice Nevius dissented.³⁰ This decision was taken to the Court of Errors and affirmed on the ground of necessity at common law as originally held by the Chief-Justice and also on the ground that the statute which had been held constitutional in New York was a justification when the fact of necessity was distinctly alleged.³¹

An example of the strictness of the Chief-Justice with regard to the pleadings in criminal cases is found in an opinion of his at the January term, 1849,³² when the rule that it is error in an indictment to express numbers or dates by Arabic figures was applied to a case where the figures occurred in a transcript of a part of an affidavit upon which perjury was alleged. The Chief-Justice made an elaborate review of the ancient authorities and said the only exception to the rule requiring dates to be set out in words at length was when a written instrument was set out in full and that in this case the indictment did not purport to set out the affidavit in full, but only to give the substance of it and that

³⁰ *The American Print Works vs. Lawrence*, 3 Zabriskie's Reports, 9.

³¹ *The American Print Works vs. Lawrence*, 3 Zabriskie's Reports,

590.

³² *Berrian vs. State*, 2 Zabriskie's Reports, 9.

therefore it was error in this case to use figures. Justice Nevius dissented on this point, and the Court of Errors, while sustaining the general rule, held that this indictment was not defective for the use of figures as therein used.³³

An elaborate opinion on a question of criminal law, then unsettled, was written by the Chief-Justice on an indictment against a corporation for maintaining a nuisance.³⁴ There were two recent decisions on opposite sides of the question, one in England that such an indictment would lie against a corporation for a misfeasance,³⁵ and one in Maine that it would not.³⁶ In an able opinion he decided that the indictment would lie against the corporation and said that regularly a part of the judgment upon conviction for a nuisance is that the nuisance be abated.

The most interesting and important of the criminal cases that came before him, was upon the conviction of James P. Donnelly of murder in the first degree.³⁷ The prisoner had been convicted and a writ of error had been issued but not returned and the prisoner's counsel moved for a writ of habeas corpus, insisting that the prisoner had a right to be personally in court on the return of the writ of error, the assignment of errors and the argument of the case. This motion

³³ State vs. Berrian, 2 Zabriskie's Reports, 679.

³⁴ State vs. Morris & Essex Railroad Co., 3 Zabriskie's Reports, 360.

³⁵ The Queen vs. Great North of England Railway Co., Queen's Bench Reports, 315.

³⁶ State vs. Great Works Milling Co., 20 Maine Reports, 41.

³⁷ Donnelly vs. The State, 2 Dutcher's Reports, 463.

was argued by Joseph P. Bradley, William Pennington and Joseph Warren Scott for the prisoner, and Joel Parker and William L. Dayton, Attorney-General for the State. The Chief-Justice held that the prisoner's presence was not a legal necessity, nor a legal right, and also that since he was represented by counsel, no disadvantage could accrue to him from his absence.

On a motion to amend the assignment of errors, the Chief-Justice held that it was not ground of error that the court below invaded the province of the jury by arguing the facts of the case or that the court in the charge gave a partial view of the evidence and omitted circumstances in favor of the prisoner. He said the rule was the same in criminal as in civil cases and that to examine such errors would "inevitably involve an examination of the whole merits of the case upon the evidence, whereas the power of the court is limited to a review of mere questions of law." This rule has always been maintained in New Jersey and a writ of error has not the effect of an appeal.

Issue having been joined on the assignments of error, the case was elaborately argued and the opinion of the Chief-Justice contains an important discussion of the law of dying declarations and a definition of the degrees of murder. In declaring that he found no error in the record and that the conviction must be affirmed, the Chief-Justice said the court had examined each of the exceptions, irrespective of the form in which they were presented, desiring that the

prisoner should have the full benefit of them without the least embarrassment from defects of form. The decision was sustained by the Court of Errors but Chancellor Williamson dissented and insisted that on one important point the Supreme Court had been too technical in not giving the accused the benefit of an exception taken to a question instead of the answer, which, he said, was plainly incompetent and very damaging.³⁸

In another case³⁹ the question was whether a mandamus could be issued to the Governor to compel him to issue a commission to the applicant as surrogate, contrary to the return of the board of county canvassers, when it appeared that the return had been made upon illegal evidence and was untrue. The Chief-Justice, reading the opinion of the court, held that the statute required the Governor to issue a commission upon the return of the board of canvassers and that the court, under color of trying the final right to the office, could not instruct him to disregard the plain requirement of the statute, and also that the mandamus must be denied "upon the broad ground that this court has no power to award a mandamus either to compel the execution of any duty enjoined on the Executive by the constitution, or to direct the manner of its performance." The Chief-Justice distinguished the case of *Marbury vs. Madison*,⁴⁰ and

³⁸ *Donnelly vs. The State*, 2 Dutcher's Reports, 601.

³⁹ *The State, (Gledhill, prosecutor) vs. The Governor*, 1 Dutcher's Reports, 331.

⁴⁰ 1 Cranch's Reports, 137.

said that giving to this decision all the weight to which the eminent character of the tribunal itself, and the cogent reasoning by which its conclusions are sustained, entitle it, it does not decide the point which was in question by the case before him. After quoting the opinion of Chief-Justice Marshall, he said:

The distinction is clearly drawn between the President himself, and the head of a department acting in a matter, which, in the opinion of the court, had passed beyond the control of the President, which he had no right to forbid, and which, therefore, it was to be presumed he had not forbidden. The case affords no warrant for the present application." And again, "It is obvious that the exercise of the power now invoked will have a direct and immediate tendency to bring the executive and judicial departments of the government into conflict. It cannot alter the principle, that in the present case the Governor assents to the application. We have Mr. Jefferson's authority for saying, that if the Supreme Court had granted a mandamus in the case of Marbury vs. Madison, he should have regarded it as trenching on his appropriate sphere of duty; that he had instructed Mr. Madison not to deliver the commission, and that he was prepared, as President of the United States, to maintain his own construction of the constitution with all the powers of the government, against any control that might be attempted by the judiciary, in effecting what he regarded as the rightful powers of the executive and senate within their peculiar departments.⁴¹

Mr. Weart in his Reminiscences,⁴² quoting this passage, says :

⁴¹ Citing Jefferson's Works, vol. IV, 85, 317, 372.

⁴² Reminiscences of some Former Noted Members of the New Jersey Bar, New Jersey Law Journal, vol. XXII, 72.

I was accustomed to hearing the Chief-Justice read opinions, but I never heard him read an opinion with so much power and force as he displayed on this occasion. He rose to the highest point of dignity in that part of the opinion embraced in these words.

In an opinion delivered in 1851⁴³ the Chief-Justice stated very clearly the principle since emphasized by the Supreme Court of the United States under the fourteenth amendment that service of notice of the proceeding is essential to jurisdiction over the person, but he said that the time and manner of the notice and whether it should be actual or constructive are subjects of legislative control and he emphasized this in *Gilman vs. Lewis* at the Hudson Circuit⁴⁴ and in *Mougin vs. Insurance Company*, where the question arose in a case involving the effect of a foreign judgment against a non-resident of the foreign state. The question of jurisdiction over foreign corporations came twice before the Supreme Court in that case⁴⁵ and the opinions have been frequently referred to in the discussion of this subject which has since become of great interest and importance. The opinion in the second case was written by the Chief-Justice and he concurred in the other. The original of the statute under which New Jersey corporations are now organized, was passed in the year in which the Chief-Justice was appointed

⁴³ *Hess vs. Cole*, 3 Zabriskie's Reports, 116.

⁴⁴ 4 Zabriskie's Reports, 246.

⁴⁵ 4 Zabriskie's Reports, 222; 1 Dutcher's Reports, 57.

and his decisions with regard to the organization and management of corporations, the rights of stockholders and the duties of directors have had a great influence upon the course of judicial decision in this and other states.

His opinions as Chancellor occupy the greater part of five volumes of the reports. A very few of them will be referred to.

In *Klapworth vs. Dressler*⁴⁶ he placed the liability of a grantee who assumes a mortgage on the true basis. In a bill to foreclose a mortgage there was an allegation that a grantee of the mortgaged premises had assumed the payment of the mortgage and a prayer that he be decreed to pay the deficiency. Chancellor Green did not attempt to find any legal liability between persons not parties to a contract. He said the grantee who assumed the mortgage was liable on the covenant to his grantor as he had decided in *Finley vs. Simpson*,⁴⁷ and had become in equity the principal debtor and the grantor had become the surety, and that the obligation of the grantee to the grantor inured to the benefit of the mortgagee who was entitled in equity to all securities in the hands of the surety. The placing of the obligation upon equitable grounds avoided the embarrassment which arose in New York where shortly after this, in *Burr vs. Beers*⁴⁸ the liability was placed on

⁴⁶ 2 Beasley's Reports, 62.

⁴⁷ 2 Zabriskie's Reports, 311.

⁴⁸ 24 New York Reports, 178.

the rule laid down in *Lawrence vs. Fox*,⁴⁹ that a person for whose benefit a contract is made may bring a suit upon it although he is not a party to it. The embarrassment arose when the suit to enforce the liability was brought after the grantee had conveyed the property back again to the original mortgagor and had no longer any interest in the property. This was the situation in *Garnsey vs. Rodgers*,⁵⁰ and *Vrooman vs. Turner*,⁵¹ and it was found difficult to reconcile this new rule of law with the equity of the situation. The decision in *Klapworth vs. Dressler* was the basis of the decisions in New Jersey in a similar situation,⁵² and has been approved and followed by the Supreme Court of the United States.⁵³

A case of much public interest and importance came before Chancellor Green shortly after his appointment.⁵⁴ The question was whether the proprietors of an exclusive franchise to maintain a toll bridge across a river were entitled to an injunction against the construction and use of a viaduct for a railroad across the same river. The Chancellor held that in the statute passed in 1790 prohibiting the erection of any other bridge than one to be built under the act was a contract on the part of the State

⁴⁹ 20 New York Reports, 268.

⁵⁰ 47 New York Reports, 233.

⁵¹ 69 New York Reports, 280.

⁵² *Cromwell vs. Currier*, 27 New Jersey Equity Reports, 152; *Cowell vs. Hospital of St. Barnabas*, 27 New Jersey Equity Reports, 650.

⁵³ *Keller vs. Ashford*, 133 United States Reports, 610.

⁵⁴ *Proprietors of the Bridge Co. vs. Hoboken Land Co.*, 2 Beasley's Reports, 503.

which could not constitutionally be abrogated, but that the act must be strictly construed and that the prohibition was intended to give an exclusive franchise in the taking of tolls on the ordinary, known methods of travel and did not apply to railway travel nor to viaducts for carrying railroads over the river. The injunction was denied and a second railroad was built between New York and Newark, the first being then operated by grantees of the rights of the bridge company. This decision was affirmed by the Court of Errors and Appeals. Judge Vredenburgh in a characteristic and amusing opinion, held that the structure proposed to be built for the railroad was not a bridge of any kind whatever as the term was used in the Charter of 1790. The decisions were affirmed by the Supreme Court of the United States.⁵⁵

Dolman vs. Cook⁵⁶ is one of the decisions of Chancellor Green that have been accepted without question, and it has been followed in later cases until the rule laid down, which is peculiar to New Jersey, has been declared by the Court of Errors to be entirely settled in this State.⁵⁷ In this case he followed a *dictum* of Chancellor Vroom and did not make his usual thorough examination of the authorities. The decision was that a debt due to the mortgagor from the estate of a mortgagee could not be set off against

⁵⁵ Bridge Proprietors vs. Hoboken, 1 Wallace's Reports, 116.

⁵⁶ Pamphlet, Sherman and Barron, Trenton, 1843.

⁵⁷ 1 McCarter's Reports.

the bond in a suit to foreclose the mortgage. The Chancellor said:⁵⁸

The proceedings to foreclose the mortgage are in rem and not against the person of the debtor. The principles of set-off do not apply. Nothing can be set up by way of satisfaction of the mortgage either in whole or in part except payment. There must either have been a direct payment of part of the debt, or an agreement that the sum proposed to be set-off should be received and credited as payment.

He cited the decision of Chancellor Vroom above referred to and a case in New York,⁵⁹ as well as Powell on Mortgages.⁶⁰ Chancellor Vroom had cited no authorities and in the case before him the owners of the land were not entitled in equity to the benefit of the set-off. The New York case, cited by Chancellor Green, only decided that a set-off could not be allowed without the filing of a cross bill. In England the doctrine of set-off had existed long before the Statute of 2 George II, Chapter 225, Section 13, allowing it in actions at law⁶¹ and it had been allowed in foreclosure proceedings when the equities between the parties required it.⁶² The in-

⁵⁸ Brown vs. Coriell, 50 New Jersey Reports, 753; Dudley vs. Bergen, 23 New Jersey Equity Reports, 397; Parker vs. Hartt, 32 New Jersey Equity Reports, 225; Hartt vs. Parker, 32 New Jersey Equity Reports, 844.

⁵⁹ White's Administrators vs. Williams, 2 Green's Chancery Reports, 376.

⁶⁰ Troup vs. Haight, Hopkins Chancery Reports, 239.

⁶¹ 3 Powell on Mortgages, Sec. 945 A.

⁶² Spence's Equity Jurisprudence, vol. I, 551; Pettat vs. Ellis, 9 Vesey's Reports, 563 & Sumner's note; James vs. Kynnier, 5 Vesey's Reports, 108.

justice of a contrary rule is apparent to an equity judge, and it was criticized by Vice-Chancellor Pitney after it had been approved by the Court of Errors in the cases above referred to.⁶³

These are some of the cases in the first of the five volumes of the equity reports during the term of Henry W. Green. It would be tedious to refer even to the most important cases in these volumes or to attempt to show in detail how greatly they have influenced the development of Equity Jurisprudence in New Jersey. In these five volumes, there are three hundred and forty-two opinions of his in the Court of Chancery and the Prerogative Court and ten in the Court of Errors and Appeals. Only thirty-two of his decisions in the lower courts were appealed from, and of these only six were reversed by the higher court.⁶⁴

The writings of Henry W. Green consist for the most part of his opinions published in the Law and the Equity reports of New Jersey. He delivered an address at the celebration of the centennial of Princeton College in 1847, and it is said that he was then offered a professorship in the proposed Law Department of the College. It was he, no doubt, that wrote the majority report of the judiciary Committee of the House of Assembly in February, 1843, disapproving of the resolution calling a constitu-

⁶³ Loder vs. Allen, 50 New Jersey Equity Reports, 631-636; set-off in foreclosure suits (by Henry C. Pitney), 16 New Jersey Law Journal, 358.

⁶⁴ New Jersey Law Journal, vol. XXII, 68.

tional convention.⁶⁵ He wrote the paper in the Princeton Review above referred to on the trial of the Reverend William Tennant for perjury.⁶⁶ His letters have not been preserved. The degree of Doctor of Laws was conferred on him by Princeton College in 1850.⁶⁷

⁶⁵ Weart's Reminiscences, New Jersey Law Journal, vol. XXII, 70.

⁶⁶ Princeton Review, July 1868.

⁶⁷ Pamphlet, Sherman and Barron, Trenton, 1843.

A contemporaneous estimate of the character and attainments of Henry W. Green is found in the report of the Executive Committee of the New Jersey Historical Society at their meeting held in May 1876. Proceedings of the New Jersey Historical Society, 2d Series, vol. IV, 153.

